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MYOPIC FEDERALISM: THE PUBLIC TRUST DOCTRINE  
AND REGULATION  
OF MILITARY ACTIVITIES

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other governmental agency.

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42D JUDGE ADVOCATE OFFICER GRADUATE COURSE

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ABSTRACT: States are turning to the public trust doctrine as a means to protect their valuable coastal resources. It imposes a duty upon state governments to preserve and wisely manage these resources. When military activities conflict with that duty, public trust law affords states a means to strike a balance that may hobble realistic training.

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## I. INTRODUCTION

Coastal areas of the United States are a valuable natural resource. This is true whether your interests lie in commercial enterprises, like fishing<sup>1</sup> and oil production<sup>2</sup>, or whether they lie in conservation or recreation.<sup>3</sup> It is also true for the United States military, its naval services<sup>4</sup> in particular.

World crises that spur U.S. action are likely to occur in the littoral<sup>5</sup> areas of the globe. While that has been true historically<sup>6</sup>, recent changes in Department of the Navy doctrine reflect a shift in emphasis from open-ocean combat to amphibious operations.<sup>7</sup> Effective amphibious operations, of any scale, large or small, are characterized by forces well trained and well rehearsed. Training and rehearsals may start out with simple map and sand table exercises, communications drills, and other types of mundane actions, but they must culminate in actual movement of ships, aircraft, and troops from deep water to beaches and further inland. This cannot be simulated. To attempt an amphibious operation without the coordination skills and lessons learned from actual training is to doom the operation to failure.

Realistic amphibious training cannot take place in a small area. Successful amphibious operations turn on their commanders' abilities to integrate the movement of aircraft, ships, submarines, landing craft, and ground forces into a coordinated attack. Changes in technology have forced commanders to plan to launch their assaults from over the horizon. If commanders are

to train to do these things well, their forces cannot be constrained to operate in an unrealistically small space.

To find the requisite space, we may not be able to look overseas. America's military forces cannot count on training in foreign waters. Domestic budget shortfalls and international pressures are forcing the United States to close many of its overseas installations.<sup>8</sup> To accommodate this change and still remain a force in readiness, U.S. amphibious forces are going to have to train at home. This will increase the density of activity in an already crowded portion of America.

Competition for coastal resources is keen. People are flocking to the coasts. Currently, fifty-four percent of the U.S. population lives in coastal counties.<sup>9</sup> By the year 2000 eighty percent of the population will live within one hour's drive of the coast.<sup>10</sup> Coastal states and Congress recognize this trend and continue to seek new ways to apportion limited coastal resources. One of the ways states are dealing with this problem is the public trust doctrine.

The public trust doctrine is an ancient legal doctrine that places the state in a trustee relationship with the beneficiaries of the trust, its citizens. The corpus of the trust can be thought of in general terms as the coastal areas of the states.<sup>11</sup>

In this paper I analyze the application of the public trust doctrine to military activities in the coastal area. I begin by attempting to ascertain just what the public trust doctrine means throughout the United States.<sup>12</sup> My focus is upon its evolution,



its scope, and its administration. Next, I delve into the nature of coastal lands, the nature of federal lands, and the extent of federal power over lands. Once these preliminary steps are complete, I discuss the application of the public trust doctrine to military activities in the littoral areas of the United States. Following that discussion, I explore the question of whether a federal public trust doctrine exists and, if so, how it would affect the military-state relationship in coastal areas.

My discussion of the public trust doctrine and military activities takes the form of three challenges:

- (1) State legislative action that finds military activities incompatible with the public trust; a direct, broadside challenge;
- (2) State action to regulate military activities in order to minimize their impact on the public trust; and
- (3) A citizen challenge to a state decision to license public trust land to the federal government for military training.

## II. WHAT IS THE PUBLIC TRUST DOCTRINE?

In a very basic form, the public trust doctrine can be thought of as a legal tool: a tool to be utilized as either a means to protect trust assets, or as an aid to decision making regarding those assets.<sup>13</sup> As you will see below, courts, legislatures, government agencies, and even the public itself can use this tool. Its most recent application is to "direct and

control economic growth and to prevent environmental degradation."<sup>14</sup> But to fully understand the nature of the public trust doctrine's role in coastal area management, we need to look to its history.

#### *A. Historical Development of the Public Trust Doctrine*

Public trust commentators trace the public trust doctrine to ancient Rome.<sup>15</sup> Roman law treated navigable waters as a *res nullius*, a thing incapable of ownership.<sup>16</sup> Rivers, riverbanks, and harbors were *res communes*, things of common ownership for all Romans to use.<sup>17</sup> Similar notions of public ownership were prevalent in civil law nations such as France and Spain.<sup>18</sup> British law recognized the public trust doctrine, but with a twist to accommodate the monarchy: tidal and riparian lands and their associated waters were owned by the Crown, but for the most part available for use by all people.<sup>19</sup> This is significant because with the notion of sovereign ownership and control came a duty. The Crown had to either preserve the trust corpus for future generations or to use the trust to benefit all people.<sup>20</sup>

British law divided ownership of these lands and waters into two parts, the *jus privatum* and the *jus publicum*. A person who held the *jus privatum* in these lands and waters did not hold the entire fee. Instead, the Crown held the *jus publicum* title to the property as trustee for the people. Thus a *jus privatum* owner had the use and enjoyment of his property subject to a dominant servitude exercised by the Crown.<sup>21</sup>

### *B. American Development of the Public Trust Doctrine*

Although established in British law, the public trust doctrine lay dormant in post-revolutionary America. Jurists were reluctant to intrude upon the sanctity of private property ownership. The public trust doctrine was also too closely associated with the British Government's control over property -- early Americans recoiled at its use.<sup>22</sup>

Clashes between private and governmental property interests eventually caused American courts to turn to the public trust doctrine as a tool of economic policy.<sup>23</sup> First used in New Jersey in 1821,<sup>24</sup> the Supreme Court's initial encounter with public trust law came twenty-one years later in *Martin v. Waddell*,<sup>25</sup> another New Jersey case. An ejectment action, the dispute in *Martin* arose over the use of tidelands.<sup>26</sup> New Jersey granted the defendant a lease of certain tidelands for oyster farming. The plaintiff alleged he held the entire fee to the lands based upon titles directly flowing out of a grant from the King of England to his brother, the Duke of York, in 1664. If correct, the plaintiff had to prevail because the state never would have acquired an interest in the lands. A fee simple title directly from the King would have extinguished the *jus publicum* interest in the lands long before New Jersey became a state.

After a lengthy discussion concerning the title conveyed by the King, the Court found the King had conveyed the land in trust "for the benefit of the nation [Britain]."<sup>27</sup> The next step in

the Court's analysis was to determine whether the King intended to transfer both the *jus privatum* and the *jus publicum* to private landowners, or to reserve the *jus publicum* "in trust for the common use of the new community to be established...."<sup>28</sup>

Consciously overlooking the clear language of the letters patent that transferred the land,<sup>29</sup> the Court turned to the King's intent.<sup>30</sup> It found he intended to preserve the sovereign's *jus publicum* for future British colonies as was the custom at the time.

Two significant points arise from the Court's decision in *Martin v. Waddell*. First, the Court was willing to violate private property rights and find a superior interest in the New Jersey government. This violation was especially severe because the plaintiff received no compensation for the loss; when land held in trust for the public is used for public benefit, an unlawful taking does not occur.<sup>31</sup> The Court could have just as easily said one of the reasons for breaking away from Great Britain was to spurn unwanted government interference with private rights, and discarded the public trust doctrine.<sup>32</sup> Second, the Court found the legislature was the American equivalent of the Crown in determining who was to administer the trust.<sup>33</sup>

Three years later the Supreme Court again spoke on the public trust doctrine in *Pollard's Lessee v. Hagan*.<sup>34</sup> The substance of that dispute began when Georgia ceded what is now Alabama to the United States. During the time the United States

held the territory, it conveyed certain lands along the Mobile River to Pollard. Alabama later granted use of the same lands to Hagan. In another ejectment action, the parties called upon the Court to decide who held title. The Court found the United States held the land in trust for Alabama until it became a state. When Alabama entered the Union, it did so on an "equal footing with the thirteen original states."<sup>35</sup> This means it took from the United States the same sovereign control over its tidal lands as the Thirteen Original Colonies took from Great Britain. Recoiling against the idea that the United States would convey a future state's sovereign interests in its lands, the Court found the United States had conveyed less than the entire fee, merely the *jus privatum*, to Pollard. Alabama therefore received the *jus publicum* when it became a state.<sup>36</sup>

*Pollard's Lessee* served to clarify the position of states admitted to the Union after the Revolution with regard to public trust lands. The equal footing doctrine continues to play a part in American jurisprudence.<sup>37</sup> But *Pollard's Lessee* did nothing to delineate the boundaries of state and federal power in the same piece of public trust land. In its only statement on that issue, the *Pollard's Lessee* Court simply said, in *dicta*, state control over tidal lands "can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution."<sup>38</sup> As a result of similar, very general statements

by later courts, those boundaries remain largely undefined, even today.<sup>39</sup>

While courts have said very little on the precise relationship between the federal government and the states regarding public trust lands, they have defined the limits of a state legislature's power in its role as trustee. The seminal case in this area is *Illinois Central Railroad Co. v. Illinois*.<sup>40</sup>

### C. *Illinois Central Railroad*

In the mid-nineteenth century, Chicago was becoming a hub for commerce moving in and out of the burgeoning American West. Congress desired to foster this growth. It authorized a grant to Illinois to help the State create a railroad to connect Chicago to the confluence of the Mississippi and Ohio Rivers and to the Illinois and Michigan Canal.<sup>41</sup> Over the next several years, Illinois Central Railroad developed its line through the City with the approval of the state legislature and the Chicago City Council.<sup>42</sup> In 1869 the legislature took an additional step that created a now famous controversy. Over the Governor's veto, it granted portions of the Lake Michigan shoreline and "'submerged lands constituting the bed of Lake Michigan'" to the railroad in fee simple -- or so it thought.<sup>43</sup> The railroad was to have title to submerged lands lakeward out to one mile.<sup>44</sup>

Chicago's City Council was not in favor of the transaction. Since the city owned a portion of the lakebed which the state legislature granted to the railroad, the legislature required the

City to quitclaim the land to the railroad or forfeit its right to \$800,000, part of the balance due by the railroad in consideration for the land.<sup>45</sup> Unpersuaded, the City remained steadfast. Equally headstrong, the railroad proceeded to construct piers on the premise that the Illinois Legislature's grant was sufficient authority.

During this period, the United States sued Illinois Central Railroad for interference with navigation in Lake Michigan. The parties reached a settlement and the War Department began to oversee construction of the railroad's piers.

In 1873, the Illinois Legislature swung into the City's line of thought. It repealed the Lake Front Act.<sup>46</sup> Suit followed soon thereafter. The City entered into the fray, but the United States declined to participate.<sup>47</sup>

Illinois Central argued the state had granted it the entire interest in the land in fee simple; the railroad claimed it held both the *jus privatum* and the *jus publicum*. Any attempt to repeal that Act, contended Illinois Central, constituted a violation of the Contracts Clause of the U.S. Constitution,<sup>48</sup> as well as a taking without compensation under the Fourteenth Amendment.<sup>49</sup> The State countered that the 1869 Act was invalid because it lacked the Governor's approval.<sup>50</sup> It also implied it lacked the power to convey the land under the public trust doctrine.<sup>51</sup> City attorneys were more direct. The City and the State held the lakebed in trust for the public, they argued,

hence the Legislature lacked the power to convey the entire title to that land to a private party.<sup>52</sup>

Justice Field's opinion for the Court probably went farther than any party anticipated. He not only struck down the 1869 Lake Front Act as invalid under the public trust doctrine,<sup>53</sup> but went on to say that certain aspects of the public trust can never be abridged.

The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them,...than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.<sup>54</sup>

Exactly what portions of public trust lands can be alienated or otherwise disposed of, for military bombing ranges, for example, remains a mystery. It is clear, however, that Justice Field contemplated two exceptions to the general rule against



alienation.<sup>55</sup> The first allows for disposition of public trust lands to "further[] one of the values within the scope of the public right."<sup>56</sup> The second allows for disposition of a portion of the public trust lands if the overall value of the remaining lands is not "substantial[ly] impair[ed]."<sup>57</sup> Both of these exceptions create more ambiguity than they resolve.<sup>58</sup>

Another important aspect of the *Illinois Central* decision is the court's treatment of the state legislature. After noting the economic importance of the harbor area to the City of Chicago,<sup>59</sup> Justice Field wrote

It would not be listened to that the control and management of the harbor of that great city -- a subject of concern to the whole people of the State -- should thus be placed elsewhere than in the people itself...The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country *at the mercy of a majority of the legislature* of the State in which the harbor is situated.<sup>60</sup>

Thus, unlike Congress' plenary power under the Property Clause of the U.S. Constitution,<sup>61</sup> a state legislature's ability to control the public trust is limited.

Up to this point, I have attempted to portray the evolution of the public trust doctrine from ancient times through to its place in American jurisprudence at the end of the nineteenth century. We must be aware of this developmental process if we are to understand the doctrine as used today and realize its potential for broader application in the future. Thus far, we have a doctrine that protects coastal waters and the lands beneath them for the benefit of the public as a whole. Attempts to convey submerged lands to private entities have been struck down or held invalid. Yet the picture is far from complete. In the next section of the paper, I attempt to: (1) delimit the parameters of the public trust doctrine by examining its scope; (2) determine which branch of government controls public trust assets; and (3) discover the doctrine's legal utility aside from challenging grants of trust lands to private parties.

#### *D. Scope of the Public Trust*

What is the public trust doctrine designed to protect? That question can best be answered by dividing the issue into three parts. First, what is the geographic reach of the doctrine? Second, what resources within that reach are protected? And finally, what is the nature of the public interest that the doctrine is intended to advance?

There are two characteristics concerning the scope of the public trust that must be kept in mind, variation and fluidity. Exactly what lies within the public trust varies from state to

state.<sup>62</sup> Moreover, the public trust doctrine is a fluid concept, capable of change over time. As a result, one cannot easily distinguish those resources that are embraced by the public trust doctrine from those that are not.<sup>63</sup> Yet the task is not impossible. Once again, the historical development of the public trust doctrine provides some answers.

1. *Geographic Reach.*--As taken from British law, the public trust doctrine only applied to navigable waterways that were subject to the ebb and flow of the tides.<sup>64</sup> The lands beneath these waters were also part of the trust corpus. Navigability was a question of law.<sup>65</sup> Thus the public trust doctrine was of concern to jurists only when coastal areas of the United States were involved. As Americans moved into the interior reaches of the country, however, the public trust doctrine moved with them. Navigable rivers and lakes became part of the trust.<sup>66</sup> Tidal influence was no longer dispositive. Neither was association with the sea. Navigability alone remained the determinative factor, and by this time navigability had become a question of fact.<sup>67</sup>

Recently, two decisions have shattered this reliance on navigability. In 1983, the California Supreme Court held, in *National Audubon Society v. Superior Court of Alpine County*, that the public trust "protects navigable waters from harm caused by the diversion of non-navigable tributaries [of those waters]."<sup>68</sup> Thus, while not including non-navigable waters in the trust corpus, the court nevertheless requires decision makers to

consider the impact diversion of those waters will have upon the corpus of the public trust proper.

Five years later the U.S. Supreme Court complicated the issue still further in *Phillips Petroleum v. Mississippi*<sup>69</sup>. Called upon to resolve a title dispute concerning lands embedded with oil and gas deposits, the Court determined that the State of Mississippi had public trust rights -- the *jus publicum* -- to tidal waters that were not navigable in fact. The Court also found that the waters need not be adjacent to the sea to fall within the trust corpus. While inland tidelands differ somewhat from coastal tidelands, the Court reasoned, "nonetheless, they still share those 'geographical, chemical, and environmental' qualities that make tidal waters unique."<sup>70</sup>

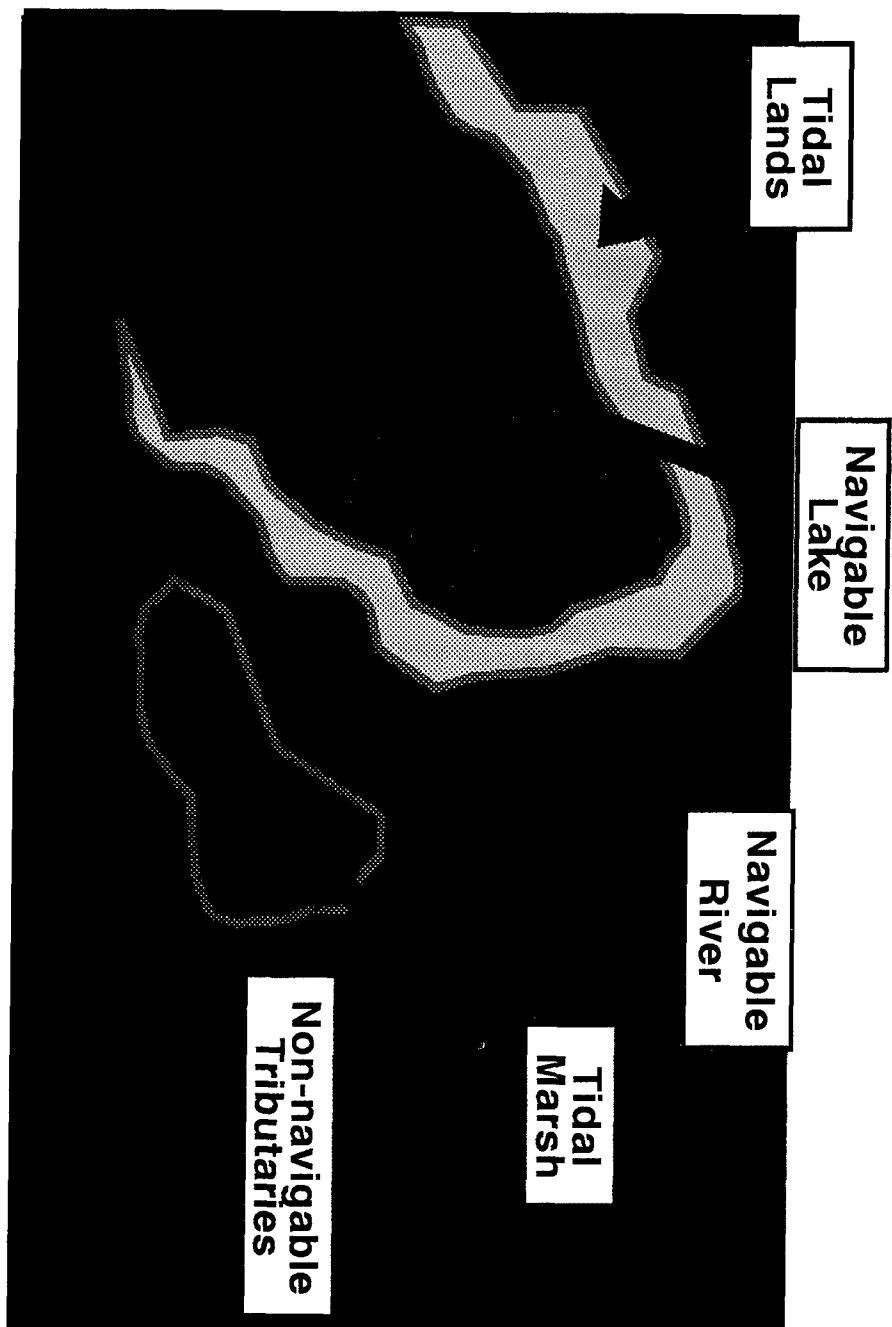
Attorneys must now exercise great care in delineating public trust boundaries. Although *Phillips Petroleum* is based only on Mississippi law, the value of coastal, riparian, and other water-laden lands makes the decision attractive authority for other states' courts to consider.<sup>71</sup> Similarly, the stakes in consumptive water-use adjudication -- satisfying the public's domestic and industrial water needs versus potential eradication of riparian ecosystems<sup>72</sup> -- make the Audubon holding attractive to conservation-oriented jurists.

In addition to the question of what types of water-laden lands are subject to the public trust doctrine, remains the issue of the inland reach of the trust corpus.<sup>73</sup> Historically, public trust assets were fixed at the high water mark.<sup>74</sup> Some states,

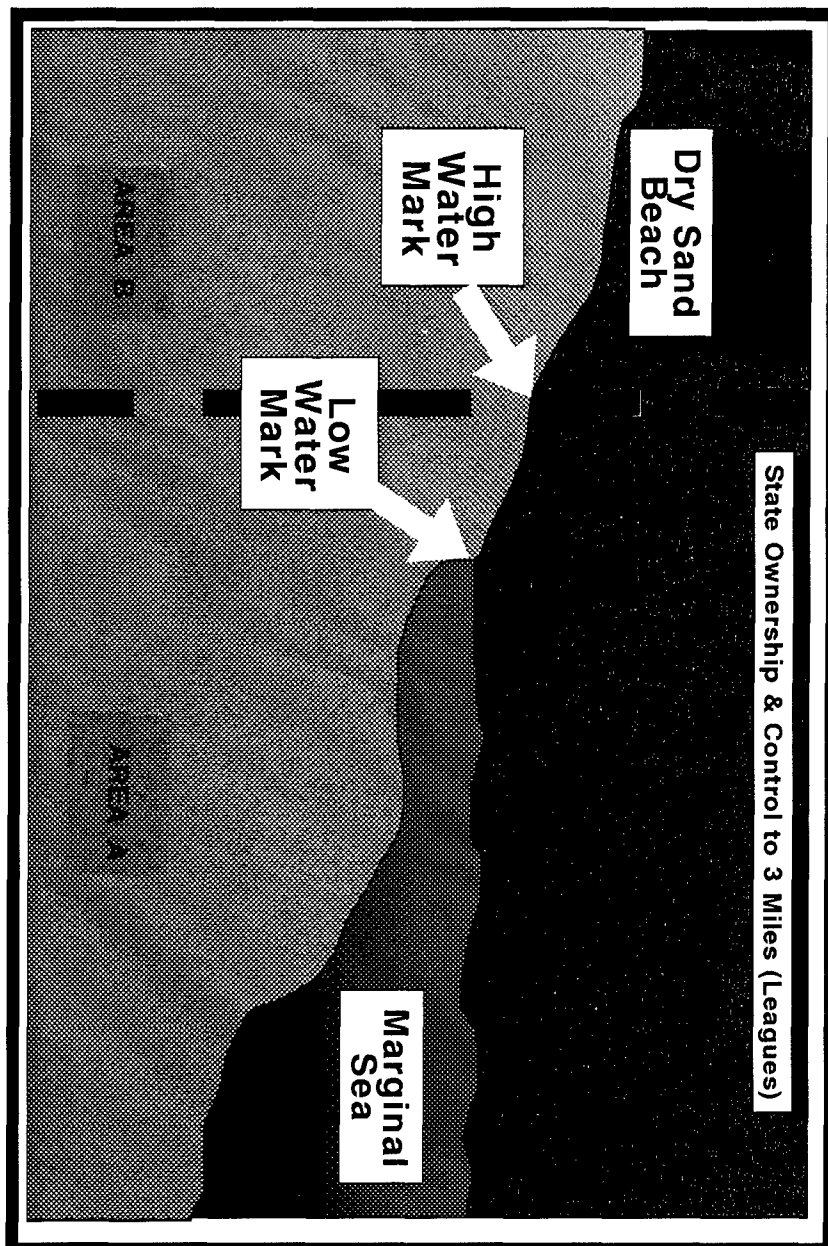
however, have taken the position that areas inland of the high water mark fall within the scope of the public trust corpus.<sup>75</sup> These decisions rest on the need to allow the public access to traditional public trust resources. Their logic is that if some means of access across fastlands<sup>76</sup> are not provided by the doctrine, then universal public use of the trust's water-laden resources is fictitious.

Determining the geographic scope of the public trust corpus in a particular state now involves several steps. Taking the most expansive viewpoint, one must determine first if the area is subject to the ebb and flow of the tide. If so, it lies within the trust corpus. If not, the second step is to determine if the waters are navigable in fact. This is more complex than it appears. For courts determine whether a body of water is navigable in fact by looking at the waterway as it existed at the time of statehood,<sup>77</sup> adjusted for accretion.<sup>78</sup> Expert testimony may be required. Waterways that are navigable in fact lie within the scope of the public trust.<sup>79</sup> Waterways that are not navigable in fact are not part of the trust corpus itself. Nonetheless, one must determine whether they influence a waterway that lies within the public trust corpus. If so, then these non-navigable waterways may figure in the overall decision at hand regarding use of public trust resources. Finally, one must determine whether the state involved has extended the public trust corpus landward of the high water mark. Figures 1 and 2 illustrate the potential public trust assets in a given area.

**FIGURE 1: GEOGRAPHIC REACH OF PUBLIC TRUST DOCTRINE**



**FIGURE 2: CROSS SECTION OF PUBLIC TRUST CORPUS**  
**AREA A: ESTABLISHED AS PART OF TRUST CORPUS**  
**AREA B: POSSIBLY A PART OF TRUST CORPUS; SEE STATE LAW**



2. *Public Trust Resources.*--Originally used to protect lands and waters for commercial fishing and to foster the movement of goods in commerce,<sup>80</sup> the scope of the public trust doctrine has enlarged greatly. Now falling within its grasp are the fish themselves,<sup>81</sup> wild game,<sup>82</sup> waterfowl,<sup>83</sup> mineral resources,<sup>84</sup> and even whole ecosystems.<sup>85</sup>

Not a barrier to use or extraction of resources, the public trust doctrine is instead a means available to enhance state management of these resources. Without running up against regulatory takings issues associated with the use of a state's police power,<sup>86</sup> states can restrict or deny use of these resources as a part of their duties to preserve trust corpora.<sup>87</sup>

3. *Protected Public Interests.*--Decisions concerning the proper way to use public trust assets involve a balancing process.<sup>88</sup> Public trust lands and waters and the living and mineral resources that occupy them are not inviolate. Neither is the public trust doctrine designed to stagnate growth nor even retard change.<sup>89</sup> Its purpose is to foster certain activities and prevent others from occurring without careful, and thorough consideration.<sup>90</sup> Just what those protected public interests are is a matter, it seems, for judicial, legislative, and agency determination.<sup>91</sup>

(a) *Public Access.*--Courts in several states have held public access to be a purpose behind the public trust doctrine.<sup>92</sup> Public access is also recognized in some state statutes.<sup>93</sup>



Concomitantly with these decisions and laws came an expansion of the purposes for which the public is to have access. Public trust jurisprudence now recognizes as protected public interests hunting,<sup>94</sup> sport fishing,<sup>95</sup> recreation,<sup>96</sup> pleasure boating,<sup>97</sup> and wildlife viewing.<sup>98</sup>

(b) *Conservation.*--Public access to public trust lands remains an important protected public interest, but it may be giving way to a new interest: conservation. Society's concern for the environment has manifested itself in a multitude of federal and state statutes and regulations.<sup>99</sup> This change in society's values -- a desire by a majority of Americans to place the environment ahead of commercial development -- has taken place largely in the last two decades. Those interests which the public trust doctrine protects have shifted with this change in America's attitude.

There is a growing public recognition that one of the most important public uses of the tidelands...is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.<sup>100</sup>

So said the California Supreme Court in 1971. Several other courts have recognized this shift and have altered their use of the public trust doctrine accordingly.<sup>101</sup> Likewise, some states

have statutes which explicitly authorize preservation of public trust lands for ecological reasons.<sup>102</sup>

What does this mean for the United States military and its need for training areas in the littoral waters of the United States? Legal machinations aside, at the very least it means the Department of Defense must compete for use of precious national resources; resources protected for commerce, navigation, fishing, public access, and preservation in their natural state.<sup>103</sup>

#### *E. Administration and Control of Public Trust Assets*

Exactly which branch of a state's government -- judicial, legislative, or executive -- administers and controls the public trust lands is unclear. When American courts adopted the public trust doctrine from British common law, they curiously made the people as a whole both trustee and beneficiary.<sup>104</sup> Under our system of government the people are the sovereign.<sup>105</sup> Perhaps the early courts were simply struck by the nature of this dramatic concept and quite naturally replaced the King in England with the people in the United States whenever the occasion arose. Whatever the reason, this notion that the people of the several states are both the beneficiaries and trustees of the same trust is problematic.

Most important is the question of how the people as the sovereign express their will. Is a simple majority in a legislature sufficient? If so, on what basis does a court intervene? If a simple majority is not sufficient, what

yardstick is a court or other governmental body to use when measuring the sovereign's intent? Finally, what role do state administrative agencies play in the administration and control of public trust lands?

To simplify this discussion, it is best to divide the issue into two parts: questions involving alienation of public trust assets and questions involving matters of less finality, such as the day-to-day administration of public trust lands. Both matters are of concern to the military. If a state sells public trust lands to the Department of the Navy, for example, it is not clear whether a court would treat the Navy as a private party or whether it would simply treat the alienation as furthering the public interest -- national defense. The same is true for leases and licenses of public trust property to Department of Defense agencies. Likewise, since military activities do take place on public trust lands and will continue to do so,<sup>106</sup> it is useful to understand the duties of those agencies charged with the day-to-day administration of public trust property.

1. *Alienation of Public Trust Lands.*--Alienation of public trust lands is not entirely prohibited.<sup>107</sup> Neither is the action unreviewable by a court as a non-justiciable political question.<sup>108</sup> Courts take the position that state legislatures can alienate at least portions of public trust lands,<sup>109</sup> and that judges have some responsibility to review those actions. What is striking, however, is the different levels of scrutiny courts utilize in answering such questions. Contrast the way in which

the Third Circuit U.S. Court of Appeals and Illinois' Supreme Court approach the problem.

Both *People ex rel. Scott v. Chicago Park District*<sup>110</sup> and *West Indian Co. v. Government of the Virgin Islands*<sup>111</sup> involve alienation of public trust lands for commercial purposes,<sup>112</sup> construction of a steel plant and construction of port facilities, respectively. The Illinois court began with a statement on the importance of Lake Michigan to the people of the state and then went on to say, "any attempted ceding of a portion of [the lake] in favor of a private interest has to withstand a *most critical examination*."<sup>113</sup> In an effort to stave off judicial reproach, the Illinois legislature had issued a declaration that the grant to the steel company was within the scope of the public trust. It read:

It is hereby declared that the grant of submerged land contained in this Act is made in aid of commerce<sup>114</sup> and will create no *impairment of the public interest in the lands and waters remaining*, but will instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people of the State of Illinois.<sup>115</sup>

Note the emphasized language is identical to the words used by Justice Fields in his *Illinois Central*<sup>116</sup> opinion. Clearly the legislature was trying to comply with, or perhaps get around, the rule in that opinion. Illinois' Supreme Court was not so easily

assuaged. It simply said, "We judge these arguments to be unpersuasive", and voided the conveyance.<sup>117</sup>

*West Indian Company* is remarkably similar to *Illinois Central*. In 1982, the Virgin Islands legislature ratified an agreement transferring land to the West Indian Company. When dredging started as a result of the conveyance in 1986, "an immediate public uproar" arose.<sup>118</sup> The legislature called itself into special session and repealed the previous act of ratification. Confronted with the question of whether the original conveyance fell within the exceptions created in *Illinois Central*,<sup>119</sup> the court first noted it must "carefully scrutinize any conveyance of submerged lands to determine if [the conveyance] is in complete congruence with the fiduciary obligations owed to the public by the sovereign."<sup>120</sup> This is similar to the approach used by the *Scott* court. Yet the Third Circuit's subsequent characterization of its duty to review the legislature's determination is markedly different. It avowed to defer to the legislature "[i]f the conveyance represents a *deliberate and reasonable* decision of the sovereign that the transaction of which the conveyance is a part affirmatively promotes the public interest in submerged lands."<sup>121</sup> Since the legislature made such a decision in 1982, the court upheld the conveyance.<sup>122</sup>

Although the *West Indian* decision was made many years after the *Scott* decision, the Third Circuit's lower level of scrutiny does not mean *Scott* should be disregarded. To the contrary,

sixteen years after *Scott*, a federal district court heard a case involving a conveyance of public trust land in Lake Michigan to Loyola University.<sup>123</sup> Using *Scott* as authority, it struck down the conveyance despite these previous actions:

- (1) A finding by the Illinois Legislature that the "public would benefit from the lakefill in various ways.";<sup>124</sup>
- (2) Issuance of a dredge and fill permit by the U.S. Army Corps of Engineers;<sup>125</sup>
- (3) A finding by the Army Corps of Engineers that the conveyance and fill project would not "significantly affect the quality of the human environment" under the National Environmental Policy Act;<sup>126</sup>
- (4) A finding by the Army Corps of Engineers that the project would not interfere with navigation under the Rivers and Harbors Act;<sup>127</sup>
- (5) Approval of the project by the City of Chicago;
- (6) A determination that the lakefill would partially halt erosion of the shore along Loyola University's property;
- (7) An agreement that Loyola University would construct a 2.1 acre park on the filled land to which the public would have unrestricted access, as well as an agreement to allow the public use of additional university sports facilities subject to reasonable restrictions;<sup>128</sup> and

(8) Insertion of a right of reentry clause into the conveyance to allow the state to reestablish title to the land if Loyola University ever ceased to operate as a private, non-profit entity.<sup>129</sup>

In rescinding the grant, the court chose not to "yield to [the Illinois Legislature's] specific...consideration of the public interest."<sup>130</sup> Instead, it noted,

The very purpose of the public trust doctrine is to police the legislature's disposition of public lands. If courts were to rubber stamp legislative decisions, as Loyola advocates, the doctrine would have no teeth. The legislature would have unfettered discretion to breach the public trust as long as it was able to articulate some gain to the public....Therefore, we find that the legislative determination that the lakefill would serve the public is no obstacle to our conclusion that the grant was in breach of the public trust.<sup>131</sup>

The *Lake Michigan Federation* court focused its attention on the action of the Illinois Legislature. It did not attach any significance to the actions of the City of Chicago. More importantly for this discussion, the court ignored the decisions made by the Army Corps of Engineers as a federal agency.<sup>132</sup>

These cases demonstrate that courts will review alienation of public trust lands, but the level of review varies from one

end of the spectrum to the other. Under the "deliberate and reasonable" standard, courts will defer to legislative findings. But when a court is willing to challenge a legislature's actions, what forms the basis of the court's decision?<sup>133</sup> That is, upon what does a court rely to determine the public's interests?<sup>134</sup> For an answer to this question, we must briefly return to *Scott* and *Lake Michigan Federation*.

Both these decisions rest on a rather simple premise: alienation of public trust lands is prohibited unless alienation benefits the public directly. An incidental economic benefit in the form of more jobs for Chicagoans was found to be insufficient.<sup>135</sup> The *Lake Michigan Federation* court characterized this as a purpose analysis. If the primary purpose of the alienation is to benefit the public, then the conveyance falls within the *Illinois Central* exception and does not violate the public trust.<sup>136</sup> Conversely, when the purpose of the alienation is to allow a university to expand its athletic facilities, as in *Lake Michigan Federation*, the public does not benefit sufficiently. The grant is void.

From a military standpoint, the primary purpose test is not helpful. It gives courts so much latitude in defining the public's interest that one cannot anticipate judicial decisions with any certainty.<sup>137</sup> This situation is somewhat improved in those states that have public trust statutes, or better yet, public trust provisions in their constitutions.<sup>138</sup> In those states, judges are not called upon to determine public interests



from common law precedent, the arguments of counsel, or their own experiences. Instead, the people have defined those interests for them. This puts military attorneys in a better position to anticipate the outcome of public trust litigation.

Of course, the negative aspect of states with statutorily or constitutionally defined public trust interests is courts are constrained by those definitions. They could not, on their own accord, place national defense within the public interest as defined by state law. To do so, military agencies would have to turn to the state's political process. This differs from states with purely common-law based bodies of public trust law. Conceivably, in those states, a judge could find national security within the interests protected by public trust law.

There are likely to be many occasions where neither a state's common law, statutes, nor constitution include national security as a protected public interest. To uphold military use of public trust lands in those instances, a court will have to rely on an expression of a superior federal right. This involves much more than a mere recitation of the Supremacy Clause.<sup>139</sup> Federal statutes and policies accommodate state public trust interests to such a degree that judges will have to search carefully to find an expression of federal superiority, if one exists at all.<sup>140</sup>

## *2. Day-to-Day Administration of Public Trust Assets.--*

Courts appear to distinguish alienation from day-to-day management of public trust resources. Generally, only

legislatures have the power to alienate public trust property,<sup>141</sup> but state administrative agencies have authority to make significant decisions regarding the use of those resources.<sup>142</sup> State agency decisions involve not only balancing the competing uses of public trust resources,<sup>143</sup> but also the regulation of activities that occur on public trust property. For example, Florida's Board of Trustees for the Internal Improvement Trust Fund<sup>144</sup> has the power to issue leases for public trust property. It can include in those leases provisions regulating the lessee's conduct.<sup>145</sup>

When relying on state agency actions, military officials should exercise caution to ensure those agencies' powers are not unconstitutionally broad. North Carolina's Department of Natural and Economic Resources sustained an attack based upon an unconstitutional delegation of power by the state legislature.<sup>146</sup> Florida's Division of State Planning did not.<sup>147</sup>

One difficulty military officials are likely to encounter is the number of agencies vested with public trust responsibilities in each state. This not only means multiplying their efforts to satisfy each agency's needs, but it may also cause them to receive contradictory opinions from the different agencies.<sup>148</sup>

#### *F. Standing*

One of the most troublesome aspects of the public trust doctrine from the military viewpoint is it provides citizens with a vehicle to challenge military activities on public trust

property. Imbedded in the public trust doctrine is the state's duty to preserve the trust corpus through wise management. Some people believe this duty rises to a fiduciary level.<sup>149</sup> Others believe it necessary to reduce the level of duty to account for the trust's unique nature.<sup>150</sup> In either case, public trust law allows individuals to sue to enforce their rights as beneficiaries.<sup>151</sup>

Lengthy negotiations and public meetings with the myriad of state agencies discussed above may not be the end of the road for military planners. Rather, planners may find themselves faced with a court battle against citizens opposed to the proposed military activity and dissatisfied with the actions of state regulatory agencies.<sup>152</sup> Again, this goes back to the problematic nature of the public trust doctrine -- citizens have dual roles as both trustees and beneficiaries.

*G. Ability to Revisit Decisions Affecting the Public Trust as Resources Degrade*

Coupled with the citizen standing aspect of the public trust doctrine is a notion that could give citizens more frequent access to courts and regulatory boards. California's Supreme Court made a statement in *National Audubon Society v. Superior Court of Alpine County*<sup>153</sup> that has received little attention yet stands to cause great concern among those involved in public trust matters. The court indicated that the state water board can re-allocate water *without regard to its previous decisions* -

- even those in which it considered the public trust doctrine.<sup>154</sup>  
This stands the notion of agency *stare decisis* on its head.

Based upon their duties to continually supervise the public trust, state agencies could use *National Audubon* as authority to void an agreement over the use of public trust resources whenever those resources began to degrade. Exactly what form and amount of degradation would be necessary before a court or administrative board would revisit a public trust decision is not discussed in *National Audubon*. Granted, state and federal regulatory agencies can impose stricter conditions on environmental permits when military installations renew them. But those permits have fixed terms;<sup>155</sup> military installations can anticipate and prepare for their renewal. *National Audubon's* statement has no such notice provision.

Of greater significance is the potential for citizens to utilize this language to continually challenge public trust use agreements. California's Supreme Court makes no mention of whether citizens have the same power as state agencies. As a matter of trust law, however, it is illogical to afford the trustee more power than the beneficiaries to maintain the trust assets.

Because citizens can sue to enforce the trust, there are apt to be more collisions between the public trust doctrine and military activities. Military officials will not be able to shield their services from the application of public trust law by simply relying on state agencies. They may need to do more. How

much more depends on both the types of challenges raised and the strength of the federal government's claim to the lands involved. It is to that strength (or weakness) that I turn first.

### III. NATURE OF THE FEDERAL-STATE RELATIONSHIP IN COASTAL LANDS AND WATERS

As a creature of state common law, codified in some states, the public trust doctrine is subject to the Supremacy Clause of the U.S. Constitution.<sup>156</sup> The Supremacy Clause shields federal activities from the application of state law through sovereign immunity and the preemption doctrine. But not all state laws which purport to regulate federal activities in the littoral regions of the United States fall victim to the Supremacy Clause. Various aspects of the relationship between federal and state governments in the those areas serve to stifle assertions of superior rights by the federal government. Two of these aspects, general federal powers over lands, and federal statutory schemes affecting coastal lands and waters, merit additional attention.

#### A. *Federal Interests in Coastal Lands*

Federal power over lands comes primarily in two forms: sovereign power and Property Clause power.<sup>157</sup> The extent of those powers depends to some degree upon both the nature of the federal interest in the lands and the manner in which they were acquired. A state's ability to apply its public trust law to federal lands

hinges, then, on the degree to which federal power over lands accommodates state law.

1. *Types of Federal Interests.*--Federal interests in coastal lands span the entire range of property law. They include lands held in fee simple, lands leased or licensed from state or private interests, and mere use agreements.<sup>158</sup> The federal government can acquire lands in many ways. It can purchase land outright.<sup>159</sup> It can condemn land using its eminent domain power.<sup>160</sup> It can retain land acquired through discovery or conquest rather than turn it over to the states.<sup>161</sup> Land so retained is in the public domain unless withdrawn for specific purposes, such as a military reservation.<sup>162</sup> Finally, the federal government can obtain land for navigational purposes by exercising its dominant servitude over lands under navigable waters.

## 2. *Federal Power over Lands*

### (a) *Commerce Clause Power and the Navigational*

*Servitude.*--Congress' Commerce Clause authority is a sovereign, not proprietary, power. Accordingly, it applies over all U.S. lands and into the surrounding sea.<sup>163</sup> Congress need not consult with states about its use. "[I]n this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted."<sup>164</sup>

"Commerce includes navigation."<sup>165</sup> This means Congress can authorize the destruction of impediments to navigation<sup>166</sup> and the

construction of aids to navigation.<sup>167</sup> When so exercised in navigable waters, the federal government need not compensate the affected landowner, including state governments, because all lands under navigable waters are burdened by a dominant federal servitude.<sup>168</sup>

Originally limited solely to navigational matters, the navigational servitude has grown in scope alongside the Commerce Clause. It may now be used to build locks and dams,<sup>169</sup> construct bridges,<sup>170</sup> and even to prevent development of lands that would destroy estuarine ecosystems.<sup>171</sup> Courts have not circumscribed the entire range of its application, but it does have limits.<sup>172</sup> The servitude extends to the high water mark,<sup>173</sup> not beyond.<sup>174</sup> While federal agencies may use it to ensure naval as well as commercial vessels are able to transit waterways, they cannot use it for military purposes unrelated to navigation.<sup>175</sup>

(b) *Property Clause.*--Control over federal lands under the Property Clause is both sovereign and proprietary.<sup>176</sup> Congress' power under the Property Clause is plenary.<sup>177</sup> It includes the ability to protect animals on public lands,<sup>178</sup> to restrict the use of electricity generated on public lands,<sup>179</sup> and to dispose of minerals within public lands.<sup>180</sup> Whether the Property Clause allows Congress to regulate activity that takes place on adjacent non-federal lands is unclear.<sup>181</sup> Congress may also authorize the sale of federal property. In keeping with its plenary authority, Congress excluded disposition of public lands from review under the Administrative Procedures Act.<sup>182</sup>

Federal law applies to all federally held lands, but not necessarily to the exclusion of state law. Both governments have interests in the lands. The question of federal preemption of state law turns on congressional intent and the nature of state interests.<sup>183</sup> If Congress did not intend to preempt state authority on public lands, then state law applies absent a conflict with federal law.<sup>184</sup>

(c) *War Powers.*--Congress has some regulatory authority over land and water under its war powers.<sup>185</sup> A more precise description of that authority is impossible because both Congress and courts appear reluctant to utilize the power.<sup>186</sup> Courts have had opportunities to expand Congress' war powers over navigable waters, but they never have taken that opportunity. At most, they have ambiguously rooted their decisions in both Congress' national defense and Commerce Clause powers.<sup>187</sup> As courts expanded Congress' Commerce Clause power, they turned less and less to the war power.<sup>188</sup> Even the statute that authorizes the Secretary of the Army to establish restricted areas in navigable waters for military live-fire training is grounded in both war and Commerce Clause powers.<sup>189</sup>

At the very least, Congress has the power to provide facilities for the nation's armed forces and to appropriate funds for their training. These powers flow directly from the words of the Constitution itself.<sup>190</sup> But, as the states have no national defense powers,<sup>191</sup> there will never be a direct conflict between a state defense statute and a federal defense statute. If



conflicts arise, they will arise because states and the military services have different concerns about lands used for military training. And, unless these concerns clash head-on, there will always be room to accommodate state interests on military lands.

(d) *Manner of Acquiring Lands.*--Another factor in the equation of state authority over federal lands is the manner in which the federal government acquired its lands. State law generally governs real property transactions that involve the federal government.<sup>192</sup> When states use their law to specifically disadvantage the federal government, however, federal law applies.<sup>193</sup>

When the federal government acquires land by condemnation, conquest, or discovery, states have no property interests in those lands.<sup>194</sup> On the other hand, lands which the federal government acquires by purchase or donation can contain provisions which allow states to retain some property interest, including a public trust, *jus publicum*, interest.<sup>195</sup> Congress has the power to extinguish state interests in those cases, but courts require evidence of congressional intent before they will supplant state law.<sup>196</sup> States that lease or license their lands to the federal government do not subject themselves to this uncertainty; they retain full ownership interests in the leased or licensed lands.<sup>197</sup>

## *B. Statutory Schemes and Intergovernmental Relations*

We should not picture the relationship between the federal and state governments in coastal lands and waters as linear. State power does not begin where the federal power ends. Instead, they usually coexist. Congress has fostered this coexistent relationship with two pieces of legislation: the Submerged Lands Act<sup>198</sup> and the Coastal Zone Management Act.<sup>199</sup>

Both of these Acts enhance state public trust law. They also broadly define the relationship between military activities and state regulatory schemes in America's littoral regions. The turbulent history of the Submerged Lands Act, in particular, demonstrates Congress' willingness to subordinate federal concerns to issues of state sovereignty. Central to that history is the struggle for control over offshore oil deposits.

1. *Conflict over Oil in Submerged Lands.*--In 1937 the Secretary of Interior, Harold Ickes, reversed his own longstanding determination that the federal government could not issue leases for the development of offshore oil wells.<sup>200</sup> His reason was to claim the offshore oil for national defense needs -- the Department of the Navy had a substantial role in the matter.<sup>201</sup> Prior to 1937, the Department of Interior believed only states had the authority to issue offshore oil leases because the states owned the lands.<sup>202</sup> One year later, Mr. Ickes had a bill introduced in Congress to declare federal ownership of submerged lands.<sup>203</sup>

That bill never passed, but it spawned a flurry of related bills. Oil leasing revenues were a significant source of income for coastal states.<sup>204</sup> Revenues aside, however, both coastal and inland states were chary of what many viewed as a federal land grab. Congress passed two bills that would have quitclaimed the U.S. interest in the lands to the coastal states. President Truman vetoed them both.<sup>205</sup>

In the meantime, the federal government asserted its ownership over submerged lands and filed suit in 1946 to eject California from the lands. The Supreme Court heard the case, *United States v. California*,<sup>206</sup> directly using its Article III "original jurisdiction" powers.<sup>207</sup> Justice Black's majority opinion made short work of California's lengthy arguments.<sup>208</sup> Finding that no one can own the marginal sea<sup>209</sup> and the lands underneath it, the Court looked instead to the question of control. Since the marginal sea is associated with national defense and international commerce, the Court found the federal government the appropriate seat of power. No compensation was necessary, in the Court's view, because California had never owned the lands.

Similar actions against both Texas and Louisiana yielded identical results.<sup>210</sup> State reaction was nearly unanimous<sup>211</sup> and charged with emotion. The Texas Legislature called for the impeachment of Justice Douglas, author of the Texas decision.<sup>212</sup> One of the reasons for solidarity among the states was the manner in which Justice Black characterized the federal government's

authority over the submerged lands. He framed the question before the Court as whether the "Federal Government has the *paramount right and power* to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered may be exploited."<sup>213</sup> He found that the federal government had that right and power because of its sole responsibilities for interstate and international commerce as well as its duty of national defense.<sup>214</sup> This has come to be known as the paramount powers doctrine.

Confusion over this new doctrine was rampant.<sup>215</sup> Some state officials took the doctrine to mean the federal government could take any state property without compensation so long it based its need for the property on national defense or commerce.<sup>216</sup> Congress heard it described in various terms, none of which were laudatory.<sup>217</sup>

In 1953 Congress passed and President Eisenhower<sup>218</sup> signed the Submerged Lands Act.<sup>219</sup> It legislatively overruled the result of the California, Louisiana, and Texas cases.<sup>220</sup> Before I discuss its provisions, however, there is an important concept to consider: the non-ownership theory in submerged lands.

Some scholars<sup>221</sup> were of the belief that no nation or government was capable of owning the lands beneath the oceans. A *res nullius* theory, as discussed above,<sup>222</sup> these scholars even applied their theory to a nation's marginal sea. Justice Black seized upon that theory, and, in an imperfect and unclear manner,

used it as the basis for his decision in *United States v. California*.<sup>223</sup> Justice Douglas followed suit in his *United States v. Louisiana* and *United States v. Texas* opinions.<sup>224</sup> The theory is important both because of its logical progression into public trust theory<sup>225</sup> and because courts continue to muddle through the distinction between sovereign control and ownership even today.<sup>226</sup>

In the Submerged Lands Act, Congress chose to discard Black's non-ownership theory and vested the states with "title to and ownership" of submerged lands.<sup>227</sup> Although the Act has survived judicial scrutiny, the question of whether the United States can quitclaim ownership of something it never possessed has not been answered.<sup>228</sup> This may become important if a state ever brings an inverse condemnation action against the United States for interference with its use and possession of submerged lands.<sup>229</sup>

2. *Submerged Lands Act.*--The Submerged Lands Act restored any public trust powers the states may have lost under the *California, Louisiana, and Texas* decisions. Of greater importance to this paper, the Submerged Lands Act may have given the states limited public trust power over federal government activities as well.

Congress chose to reaffirm the states' titles to submerged lands under inland and tidal waters, as expressed in several Supreme Court decisions,<sup>230</sup> and link them with titles to submerged lands seaward of the low water mark.<sup>231</sup> All of these inland lands have been linked historically to the public trust doctrine; they

are part of the trust corpus. By linking them to submerged lands in the marginal sea, Congress has affirmatively extended the states' public trust reach seaward to three miles.<sup>232</sup> No doubt remains.<sup>233</sup>

What is in doubt is the extent of federal power over submerged lands in the marginal sea. For although Congress disregarded Justice Black's non-ownership theory when it vested ownership rights in the states, it chose to use his language in reference to the powers retained by the United States.

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be *paramount* to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States...by section 1311<sup>234</sup> of this title.<sup>235</sup>

Congress' primary purpose in enacting the Submerged Lands Act was to release to the states any federal interests in oil deposits under the marginal sea.<sup>236</sup> When viewed from that perspective, the Act's language makes sense. The federal

government is to have no role in the control of oil and gas leases in the marginal sea. If the federal government needs the oil for national defense, it has priority rights to buy it "at the prevailing market price."<sup>237</sup> Separation of federal and state authority under the Act, however, is not limited to the issue of oil deposits. The Act covers lands and natural resources without limitation.<sup>238</sup>

Three factors complicate the process of isolating those instances in which the federal government can exercise its authority in the marginal sea from those instances when it cannot: Justice Black's paramount powers doctrine, the breadth of Congress' Commerce Clause<sup>239</sup> powers, and the Act's language.

Congress did not know what to make of its new found paramount powers.<sup>240</sup> While quitclaim advocates had the votes to give the states power over oil in the marginal sea, Congress could not entirely cede its authority over that area of land and water. Once Congress has constitutional power, however derived, it cannot relinquish it.<sup>241</sup> In this way, the Court had Congress in a box. Congress had to use language in the statute sufficient to convince the Court that the federal government had no interest in offshore oil, but that language could not be so broad as to abdicate Congress' paramount powers. Obviously Congress succeeded. The Submerged Lands Act is constitutional. But perhaps the reason for the Court's simplistic treatment of the constitutionality of the Act in its per curium opinion in *Alabama v. Texas*<sup>242</sup> was its recognition of the difficulty of drafting

language to effectuate Congress' intent. As the Court was aware of the political ramifications of its decision,<sup>243</sup> it might have opted to rely on Congress' intent, and thereby avoid the need to delve further into the distinction between state and federal authority.

Congress chose to limit the federal government's authority in the marginal sea to "commerce, navigation,<sup>244</sup> national defense, and international affairs."<sup>245</sup> If done in the early years of this country's existence, the statute would be easier to understand. Nineteenth century American courts limited Congress' powers in navigable waters to these same three areas.<sup>246</sup> Today Congress' Commerce Clause power is so pervasive that it goes entirely beyond regulation of commerce.<sup>247</sup> Thus, for the statute to limit federal authority in the marginal sea to matters dealing with commerce, is to place no limit on the federal government's power at all.

Federal officials who try to ascertain the scope of their authority in the marginal sea are now faced with a dilemma. If a court reads the statute literally, taking into account the present breadth of Congress' Commerce Clause authority, then federal authority will almost always prevail. On the other hand, if the court determines the language ambiguous and looks to Congress' intent, the result might be a curtailment of federal authority. With such a broad spectrum of possibilities, one is left uncertain.



The few judicial decisions that seek to clarify the scope of federal power in the marginal sea range this spectrum. They also highlight the ambiguity of the Submerged Lands Act's language. For example, in construing the seaward extent of a state's authority under the Act, the Supreme Court said the United States had "no interest" in the "lands, minerals, and other natural resources" inland of the federal-state boundary.<sup>248</sup> Likewise, it is inappropriate for a court to exercise admiralty jurisdiction over a case involving submerged lands governed by the Act because the state owns those lands.<sup>249</sup> Yet the Army Corps of Engineers (ACOE) can take into account conservation of the environment when it makes a decision concerning a request for a dredge and fill permit of submerged lands.<sup>250</sup> Congress' Commerce Clause power gives the ACOE that authority. Under the same delegated power, the ACOE may also be able to consider public access to beaches.<sup>251</sup> Finally, because of a need to protect the United States' superior interest, federal-state property disputes rest upon federal, not state, law.<sup>252</sup>

One way to attempt to explain this confusion is to distinguish property rights from police power regulation. This would justify the Supreme Court's sweeping nullification of United States interests in the marginal sea, and support the other decisions cited above. If correct, this distinction means the federal government can "regulat[e] and control"<sup>253</sup> the marginal sea for purposes such as national defense, but in doing so it cannot interfere with the ownership and public trust rights

of the coastal states. This is a fine line to walk for the Department of Defense.

Consider a decision by a military commander to periodically close a three-dimensional portion of the air, land, and sea within the marginal sea for military exercises. Assume he has no specific congressional authority to take this action. Would he run afoul of the Submerged Lands Act? On the one hand, his decision is an exercise of the United States' paramount power of national defense. On the other hand, military control of the area amounts to "management" and "use" of the lands and natural resources in the marginal sea, activities prohibited by § 1314 of the Act.

This hypothetical situation is not an unrealistic one. Congress has considered the matter in a similar context. Shortly after it passed the Submerged Lands Act, Congress passed the Outer Continental Shelf Lands Act.<sup>254</sup> In this Act, Congress established a federal management scheme for the development of mineral resources seaward of the three mile limit. In recognition of the importance of the area to national defense, Congress provided for the Secretary of Defense to restrict certain areas from oil and gas exploration and development.<sup>255</sup> No further congressional action is required. The Submerged Lands Act contains no such provision. Despite Congress' unquestionable authority, in light of *United States v. California*, to give the Secretary of Defense similar discretion within the marginal sea, it chose not to do so.

One can argue the paramount powers doctrine allows the Secretary of Defense similar power in the marginal sea, despite Congress' silence. None of the Supreme Court's three offshore oil decisions -- *California*, *Louisiana*, or *Texas* -- specify where the determination to invoke the United States' paramount powers of national defense must originate. Presumably, the determination can originate in either Congress or the Executive. Neither do those cases indicate a certain level of authority is necessary to invoke the federal government's paramount powers. Certainly the Secretary of Defense, a person granted broad discretionary powers and vested with great responsibilities<sup>256</sup> can make such a determination, if the opportunity still exists.

Neither the courts nor Congress, however, would receive this argument favorably. As a practical matter, the Submerged Lands Act has foreclosed this opportunity. By declaring the states owners of the marginal seabed, and, in the Supreme Court's eyes,<sup>257</sup> delegating to them broad federal powers to control those lands, Congress has established itself as the only authority legally competent to completely deny a state use of those lands. Absence of a Submerged Lands Act provision similar to the "National defense area" section of the Outer Continental Shelf Lands Act<sup>258</sup> supports this view, as does the narrow analysis courts use under the preemption doctrine.<sup>259</sup>

Thus military agencies cannot gain control of areas within the marginal sea by simply asserting a superior federal right. Congressional action will be necessary. States, on the other

hand, gain power under the Submerged Lands Act. They now have a broad grant of congressional authority to exercise both their public trust and police powers over activities in the marginal sea. Missing from both the Submerged Lands Act and the common law evolution of the public trust doctrine, however, is a clear means to enforce a state's public trust law against the federal government. The Coastal Zone Management Act provides that means.

3. *Coastal Zone Management Act.*--Unlike the Submerged Lands Act, the Coastal Zone Management Act<sup>260</sup> did not arise as a result of a federal-state conflict.<sup>261</sup> Concern over the future of America's coasts increased gradually, gaining momentum through the years from 1950 to 1969.<sup>262</sup> A federal report, entitled "Our Nation and the Sea,"<sup>263</sup> highlighted the problems of development and resource exploitation. As a solution, it recommended a federal act which would "permit conscious and informed choices among development alternatives and which [would] provide for proper planning."<sup>264</sup> Congress responded with the Coastal Zone Management Act. Although a federal statute, states are the linchpins of its effectiveness. "The states were selected as the key to effective coastal management and protection, while the federal role was to encourage states to exercise their full authority over coastal areas by developing management programs meeting minimum federal standards."<sup>265</sup>

In many ways the Coastal Zone Management Act mirrors state public trust law. It too concerns the wise use of coastal resources. Congress' first finding in the act states "[t]here is

a national interest in the effective management, beneficial use, protection, and development of the coastal zone."<sup>266</sup> Accordingly, the Act declares national policy to be, "to preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations."<sup>267</sup> Like the public trust doctrine, the Coastal Zone Management Act is a law that balances competing interests.<sup>268</sup> Among the many interests it recognizes, are conservation, recreation, public access, commercial development, fishing, waterfront redevelopment, and national defense.<sup>269</sup> As with the public trust doctrine, its emphasis has shifted over the years. The act as amended in 1990 attaches greater weight to "environmental protection values" than it did in the past.<sup>270</sup>

The National Oceanic and Atmospheric Administration (NOAA) administers the Coastal Zone Management Act for the federal government.<sup>271</sup> One of NOAA's functions is to determine whether states' coastal management programs meet federal standards.<sup>272</sup> A state program need not contain regulations of such particularity to render unnecessary the need for case-by-case state decisions about future uses of its coastal zone.<sup>273</sup> Wise management and informed decision making, not predictability, are the purposes of the Act. For that reason, a state's program does not have to serve as a large zoning map.<sup>274</sup> In this way too, the Coastal Zone Management Act is like the public trust doctrine; the outcome of its use depends upon the facts of each proposed action.

Each state defines the inland reach of its "coastal zone."<sup>275</sup> The seaward reach is fixed at three miles from the low water mark.<sup>276</sup> By definition, then, the states' coastal zones must include all of the lands and waters in the littoral United States that are subject to public trust law. There is one exception, however: all federal lands are excluded from the coastal zone.<sup>277</sup>

This does not mean federal agencies can ignore the Coastal Zone Management Act. To the contrary, the Act requires [e]ach federal agency activity within *or outside* the coastal zone that affects any land or water use or natural resource of the coastal zone [] [to] be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.<sup>278</sup>

This section requires what has come to be known as a "consistency determination." Federal agencies must make written determinations of the effects proposed projects will have upon the coastal zone and to compare those effects to state management programs. Those projects which are not consistent to the maximum extent practicable cannot proceed. "To the maximum extent practicable" means "fully consistent with...[state] programs unless compliance is prohibited...[by] law."<sup>279</sup> Disagreements between state and federal agencies over consistency are resolved either voluntarily through mediation by the Secretary of Commerce,<sup>280</sup> or by a federal court.<sup>281</sup> Congress considers the consistency determination the "heart" of the Act.<sup>282</sup> Without it,

Congress believes states would not participate in the federal scheme.<sup>283</sup>

As originally worded, the Coastal Zone Management Act required federal agencies to formulate consistency determinations only when their activities "directly affect[ed]" the coastal zone.<sup>284</sup> Congress amended the Act in 1990<sup>285</sup> to legislatively overrule a Supreme Court decision which narrowly construed "directly affect" to exclude sales of oil leases for areas on the Outer Continental Shelf.<sup>286</sup> The amended version of the Act, as quoted above,

establishes a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to the [Act's] requirement for consistency if it will affect any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement.<sup>287</sup>

Federal agencies will be hard pressed now to convince the Secretary of Commerce or a court that their activities in the littoral areas of the United States do not require consistency determinations.<sup>288</sup>

Like the Submerged Lands Act, the Coastal Zone Management Act has an exemption to the consistency determination requirement for those activities "in the paramount interest of the United States."<sup>289</sup> Unlike the Submerged Lands Act exemption, however, the consistency determination exemption contains explicit

procedural steps.<sup>290</sup> Lack of funds to make the activity consistent is not grounds for a waiver.<sup>291</sup> The onerous nature and political visibility of the exemption procedures make it unlikely any federal agency will make use of the provision.<sup>292</sup>

As stated previously, the Coastal Zone Management Act protects public interests in coastal lands in much the same manner as the public trust doctrine. In order to accomplish these broad protective goals, the statute acts in conjunction with other federal land-use and environmental laws.<sup>293</sup> It does not repeal them.<sup>294</sup> Nor does the Act preempt state law.<sup>295</sup> To the contrary, Congress expects states to incorporate their land-use and environmental laws into their coastal management programs.<sup>296</sup>

One body of state law that can be incorporated into a state's coastal management program is its public trust law.<sup>297</sup> If a state takes this step, it can regulate federal activities in the coastal zone in a manner that enhances the public trust. Two means of regulation are possible: (1) indirectly, through a consistency determination by the federal agency; and (2) directly, by way of a permit.<sup>298</sup> In either case, federal agencies will have to comply with state public trust law in the Nation's coastal areas.

#### *4. Public Trust Doctrine Still a Meaningful Legal*

*Tool.*--Since the enactment of the Submerged Lands Act and the Coastal Zone Management Act, one might question the usefulness of the public trust doctrine as a legal tool. It appears the purposes and interests protected by the doctrine are



subsumed in those laws. To some degree this is true. The Coastal Zone Management Act requires states to balance public interests in much the same manner as does the public trust doctrine. The Submerged Lands Act limits military authority in the marginal sea.

Yet a closer inspection of the public trust doctrine reveals its continued usefulness. Foremost among its attributes is its flexibility. As a common law creation, it is capable of change in both scope and purpose to meet society's changing values.<sup>299</sup> Statutes, on the other hand, have fixed purposes and meanings. While they too can change, the legislative process is slower because more people take part in the deliberative process. Moreover, a court can fashion a remedy directly using the public trust doctrine; legislative solutions to problems apply only prospectively.

Public trust law, although not an ownership right, is a property based doctrine. It may succeed in securing state control over a resource where a state's police powers might fail. Based on a duty to preserve the trust corpus for its citizens, states can prohibit activities that harm or devalue the corpus. So long as those prohibitions do not discriminate against non-residents they are constitutional.<sup>300</sup>

Public trust law imposes a duty upon states to continually supervise the trust corpus.<sup>301</sup> Laches does not bar the application of that duty.<sup>302</sup> Citizens have standing to challenge state decisions involving the public trust;<sup>303</sup> whereas, under the

Coastal Zone Management Act, only affected parties can challenge state and federal decisions.<sup>304</sup> Federal agencies need to take heed of these aspects of the public trust doctrine. They allow state agencies to be aggressive in their actions to preserve coastal resources and enhance the vigilance of concerned citizens.

Finally, military planners should be aware that Congress wants states to acquire more lands to ensure greater public access to coastal resources.<sup>305</sup> Through the Coastal Zone Management Act, Congress provides funds for states to acquire lands.<sup>306</sup> Recall that private lands within the trust corpus are burdened by the state's dominant *jus publicum* interest.<sup>307</sup> As America's coastal areas become more densely populated, states may be more inclined to exercise this dominant interest.<sup>308</sup> This may serve simply to limit the discourse over military use of coastal training areas to state and federal agencies. It could also serve to further restrict military activity because of a public demand for peace and solitude in pristine places.<sup>309</sup>

#### IV. APPLICATION OF THE PUBLIC TRUST DOCTRINE TO MILITARY ACTIVITIES

As will be seen below, there are many ways in which state public trust law might apply to military activities in the littoral United States. Fundamental to any legal challenge of that application are the concepts of sovereign immunity and federal preemption. Courts narrowly construe both concepts, producing a result unique to our federalist system: federal and

state laws usually coexist, but the federal government's compliance with them can rarely be challenged.

For this part of the paper imagine three situations. In the first, a state legislature passes a law that declares military training incompatible with preservation of its public trust values, a flat out ban on military training. In the second, the state takes a less hostile approach. State administrative agencies attempt to use state public trust law to regulate the manner in which the Department of Defense utilizes state public trust resources. The third situation involves a citizens' suit to challenge a state agency's decision to license public trust lands to the Department of Defense.

#### *A. Ban on Military Training*

*Scenario: Disturbed over an apparent reluctance by the military to truly embrace its coastal preservation policies, a coastal state with significant amphibious training facilities (North Carolina, California, or Hawaii, for example) decides to prohibit military training in its coastal region. The state legislature passes a bill which the governor signs effecting this decision. Among the legal bases put forth as supportive of its decision is the state's public trust law. Rather than wait for a political response, which the Department of Defense fears will produce a compromise that further erodes military training flexibility, the United States brings suit to declare the state law invalid.*

A state's decision to prohibit military training in areas protected by its public trust law may never come about for political reasons.<sup>310</sup> From a purely legal standpoint, however, it is easy to see how a state could find incompatibility. Military training restricts access to public trust resources, a restriction that affects both commercial and non-commercial use of the trust corpus. Navy ships discharge wastes into coastal waters. Army and Navy landing craft and Marine Corps amphibious tractors disturb the seabed and beaches. Live-fire exercises in coastal waters result in millions of spent rounds of ammunition building up on the ocean floor. Military aviators drop ironclad, concrete filled practice bombs that also settle on the seabed. Finally, military training is a noisy activity. The noise may conflict with the public trust doctrine's preservation of recreational and aesthetic values.<sup>311</sup>

1. *Preemption of State Law.*--The federal government's challenge to the state ban rests solidly on preemption. Federal law is the supreme law of the land; and, in any case where the federal law and state law cannot coexist, the federal law prevails.<sup>312</sup> Key to this issue are congressional intent and actual conflict between the laws. The purpose behind the state law or the validity of its assertions become irrelevant.<sup>313</sup>

Preemption can occur in three ways.<sup>314</sup> "Congress can define explicitly the extent to which its enactments pre-empt state law."<sup>315</sup> This occurs so infrequently that some courts decide to omit this step in their analysis.<sup>316</sup> Despite the near certainty

that Congress has never intended to allow a state to use its environmental and land-use laws to entirely proscribe military training, evidence of that intent is non-existent. There is no language in federal environmental or land-use statutes<sup>317</sup> or the National Defense Authorization Acts,<sup>318</sup> that manifests that intent. This can be expected in a political system based upon the premise that the federal government's power ultimately flows from power delegated by the states.<sup>319</sup>

The second way in which a court can find preemption is to ascertain that "state law...regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."<sup>320</sup> For evidence of this intent, courts look to pervasive federal regulations that do not leave room for state regulation, or a field of activity in "which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>321</sup> If the field of activity in this case is national defense, then the analysis ends here; states have no role in the security of this nation.<sup>322</sup>

To counter the federal argument that the state law is an attempt to regulate military activity, the state would assert that its law does not entirely prohibit military activity within its borders. Instead, the state would characterize its ban as a land-use and environmental law that furthers both state and national coastal preservation interests. State attorneys could buttress their position by pointing to the Submerged Lands Act's

cession of federal authority to manage natural resources in the marginal sea and the Coastal Zone Management Act's scheme of state management.

At the end of the second part of the preemption analysis there may be preemption depending on how a court characterizes the state law: if national security, then preemption; if environmental and land-use, then coexistence. Fortunately, the third prong of the preemption test yields a definite answer. It mandates preemption when either: (1) it is impossible to comply with both state and federal requirements, or (2) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>323</sup> A state ban on military training in its coastal region would run afoul of both (1) and (2). It is inconceivable that Congress would appropriate money to construct and operate training ranges and military installations in the coastal region of a state and then acquiesce to that state's veto of military activity.

California's reluctance to embrace federal nuclear power programs provides some illumination on the question of flat-ban preemption. Following a finding by the Nuclear Regulatory Commission, a federal agency, that nuclear powerplants did not pose a safety concern, California's legislature passed a statute that forbade siting of nuclear energy facilities in the state unless adequate waste storage and disposal facilities were available for nuclear waste. Arriving before the Supreme Court

as *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*,<sup>324</sup> the case hinged on preemption. After noting the "traditional role" of states in "electricity production," the Court found the state law was not preempted by federal laws and regulations.<sup>325</sup> Like the question of whether the state's ban of military activities in the coastal region is grounded in national security or land-use and environmental law, this case presented the question of whether California's law concerned nuclear safety or the economics of waste storage and disposal. The Court accepted California's position that the law dealt with economics. Had it been otherwise, California's law would not have survived.

A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the N[uclear] R[egulatory] C[ommission]...that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal. A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use --- and would be pre-empted for that reason.<sup>326</sup>

So it would be with a state prohibition on military training based on the state's public trust law. Such a prohibition would directly conflict with both congressional plans for military training and determinations of military officials concerning the manner in which America's armed forces should train.<sup>327</sup>

2. *A Negative War Powers Theory.*--Although there is little room for doubt about the efficacy of a federal preemption argument in this scenario, another reason may exist to negate the state's law. This is a negative War Powers theory, similar to the Supreme Court's negative Commerce Clause theory as set out in *Pike v. Brice Church, Inc.*<sup>328</sup> Negative Commerce Clause theory allows for some state regulation of commerce, but states cannot tread too deeply upon Congress' role in that field. The purpose of the theory is to prevent the states from enacting laws that splinter the nation by restricting the flow of goods in commerce.<sup>329</sup> A similar purpose would underlie a negative War Powers theory: to prevent the states from interfering with the security of the nation.

Courts utilize negative Commerce Clause theory in cases where Congress has not spoken to affirmatively exclude state regulation in a particular area. It would thus be appropriate to apply a negative War Powers analysis here, where Congress has spoken only vaguely about military training requirements.

To determine whether the state's application of its public trust law in this scenario violates the negative aspects of the



War Powers clauses, it is only necessary to rephrase the test used by Justice Stewart in *Pike*.

Where the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce [national security] are only incidental, it will be upheld unless the burden imposed on such commerce [security] is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.<sup>330</sup>

A negative War Powers theory would be less tolerant of state law than the negative Commerce Clause theory because states have no role in national defense. Under the *Pike* analysis, then, the state's public trust interest would be legitimate, but there would be no room for the state law in the realm of national security. The effect of the state law upon national security would be direct, not incidental.<sup>331</sup> Accordingly, the state's law would fail.

#### *B. State Regulation of Military Activities*

Scenario: *For various reasons, political, economic, and otherwise, state officials do not want to directly oppose military training in coastal regions. Nevertheless, they have an obligation and desire to lessen the impacts of military activities on their coastal resources. To do so, state officials*

determine to exercise the public trust doctrine to its fullest extent. First they view military training from the standpoint of regulatable activities, such as hazardous waste generation and water pollution. Next, they examine the laws which allow the state either to regulate the military directly, or to influence the way in which other federal agencies regulate military activities. Finally, they incorporate their public trust values into both their laws and their strategies to influence federal regulatory agencies.

Commentators who seek to expand the use of the public trust doctrine recognize the difficulty of state control of federal activities: sovereign immunity. State laws do not apply to the federal government itself unless Congress "clear[ly] and unambiguous[ly]" waives sovereign immunity.<sup>332</sup> To overcome this difficulty, commentators recommend incorporating state public trust laws into those statutes that do apply to the federal government.<sup>333</sup> Contrary to the previous scenario, preemption is not an issue; Congress expects federal agencies to comply with several state environmental and land-use laws.<sup>334</sup> The key in this case is to identify those legal avenues of approach that allow state regulation of military activities. There are several.<sup>335</sup>

1. *Coastal Zone Management Act.*--Foremost among these avenues is the Coastal Zone Management Act. Through the consistency determination states can force military commanders to apply state public trust law to military activities that affect

the coastal zone. State coastal management programs may also have permit requirements for coastal zone activities. In cases where military agencies have to obtain permits, states can impose permit conditions that uphold public trust values. California and Washington, for example, have coastal activity permit requirements.<sup>336</sup> North Carolina has a permit requirement for its areas of environmental concern,<sup>337</sup> but exempts "federal agency development activities."<sup>338</sup>

Look to state constitutions, statutes, and regulations for public trust language. North Carolina's constitution evinces public trust values.

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State...to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.<sup>339</sup>

California's constitution explicitly restricts alienation of tidelands,<sup>340</sup> and provides for freedom of navigation through and public access to navigable waters.<sup>341</sup> Its "[l]egislature shall enact such laws as will give the most liberal construction to

this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."<sup>342</sup>

Public trust law, as applied through state coastal management programs and other vehicles, is not directorial in nature. Its effect is more subtle. Statutes infused with public trust values foreclose opportunities, restrict choices, and tip the scale toward maintaining the status quo. In California, conflicts among the policies in its coastal management program are to "be resolved in a manner which on balance is the most protective of significant coastal resources."<sup>343</sup> Both California and North Carolina favor acquisition and maintenance of public ways to beaches over coastal development.<sup>344</sup> Projects in North Carolina that "significantly interfere[] with the public right of navigation or other public trust rights...shall not be allowed" unless they have "an overriding public benefit."<sup>345</sup>

Suppose a military department wanted to establish a multiple-use training area in a state's public trust waters that would provide for bombing and gunnery ranges and amphibious landing sites. What effect would a state's coastal management program -- suitably enhanced by the incorporation of its public trust law -- have on that desire?

State scrutiny of such a project would be intense. Despite the language in the Coastal Zone Management Act that requires states to give "priority consideration...for siting major facilities related to national defense,"<sup>346</sup> neither California's nor North Carolina's coastal management statutes mention siting

defense facilities or training areas. In fact, California even puts the United States on notice that exclusion of federal lands from the definition of the coastal zone will not inhibit state action. "California shall, consistent with applicable federal and state laws, continue to exercise the full range of powers, rights, and privileges it now possesses or which may be granted [over federal lands]." <sup>347</sup>

In its consistency determination, the military department would have to consider a host of state policies. California has an exception to its public access for national security needs, <sup>348</sup> but the military department could not overlook other public trust values, including: recreation, <sup>349</sup> preservation of marine resources, <sup>350</sup> pollution control, <sup>351</sup> commercial and recreational fishing, <sup>352</sup> and aquaculture. <sup>353</sup> North Carolina has policy guidelines for erosion, public access, mitigation, water quality, coastal airspace use, and "[w]ater and [w]etland [b]ased [t]arget [a]reas for [m]ilitary [t]raining [a]ctivities." <sup>354</sup> The latter policy reads:

The use of water and wetland-based target areas for military training purposes may result in adverse impacts on coastal resources and on the exercise of public trust rights. The public interest requires that, to the maximum extent practicable, use of such targets not infringe on public trust rights, cause damage to public trust resources, violate existing

water quality standards or result in public safety hazards.<sup>355</sup>

Terms in this policy, such as "public trust rights" and "damage to public trust resources," are sufficiently vague to allow state officials to find virtually any military live-fire training inconsistent with the state's coastal management program.

In a state with an applicable permit program, the military department would have to be ready to negotiate permit conditions. These conditions would likely impose time, place, and manner restrictions on military training that would further public trust values.

Although these policies and requirements are significant, military officials should not be daunted by them. They, not the states, make the consistency determinations. In so doing, they can point to federal policies that already account for some of the state policies. For example, military restrictions on navigable waters cannot "unreasonably...interfere" with commercial fishing.<sup>356</sup> Military installation commanders must manage their lands to provide for multiple uses and public access.<sup>357</sup> Military officials can even point to a judicial determination that military training areas enhance rather than destroy living natural resources.<sup>358</sup> In North Carolina, military officials should strive to convince the state that military training is of "overriding public benefit."<sup>359</sup>

2. *Actions under the Comprehensive Environmental Response, Compensation, and Liability Act.--*

Military agencies have to respond to releases of hazardous substances in the same manner as private entities.<sup>360</sup> When evaluating remedial alternatives for these releases, military agencies must develop "applicable, or relevant and appropriate requirements" (ARARS).<sup>361</sup> These are the laws that drive the manner and level of remedial activity. They answer the question, "How clean is clean?" States assist in selecting ARARS,<sup>362</sup> and may seek to make their public trust law a factor in the way military agencies clean up the release.<sup>363</sup>

In addition to hazardous substance responses, the Department of Defense has specific CERCLA responsibilities for offshore oil spills caused by its vessels or released from its facilities.<sup>364</sup> In the case of either an oil or a hazardous substance release, public trustees for natural resources must be notified.<sup>365</sup> In the marginal sea, the adjacent state would be the trustee.<sup>366</sup> Trustees can seek an administrative order, injunctive relief, or a commitment to remove the release.<sup>367</sup>

One of the most attractive remedial actions is to impose institutional and land-use controls upon the release site, and then monitor it to ensure the contamination does not migrate. This means the Department of Defense would agree to use the release site in a manner that lessens the risk to human health (e.g., a bombing range vice a school) and to place restrictions in the deed should it ever sell the property. Obviously these

actions are far cheaper than removing the contamination and disposing of it as hazardous waste. The Environmental Protection Agency expects responsible parties to consider institutional and land-use controls as a possible remedial action.<sup>368</sup>

Protection of public trust interests, such as wildlife preservation and public access, may foreclose institutional and land-use controls as remedial options. As a result, military agencies might be forced to adopt more expensive alternatives to clean up the release.<sup>369</sup> State agencies pursuing their trustee obligations could drive up the costs still further by bringing actions to compel military agencies to not only remove the contamination, but to restore the natural resources.<sup>370</sup>

3. *Resource Conservation and Recovery Act.*--Military agencies must manage hazardous wastes they generate in accordance with the Resource Conservation and Recovery Act (RCRA).<sup>371</sup> The act has strictures governing the storage, treatment, and disposal of hazardous waste. It also imposes permanent joint and several liability upon waste generators for any harm to human health and the environment caused by the release of hazardous wastes. Although the Environmental Protection Agency (EPA) has overall responsibility to implement the RCRA, states can obtain RCRA authority from the EPA.<sup>372</sup> That authority allows states to inspect hazardous waste facilities and to issue permits controlling the operation of those facilities. States RCRA authority extends to regulation of federal agencies, including the Department of Defense.



Congress recently amended the RCRA through the Federal Facilities Compliance Act (FFCA).<sup>373</sup> Among other things, the FFCA waived federal sovereign immunity with respect to procedural and substantive requirements of state hazardous waste laws. States can now enjoin federal agency hazardous waste operations, issue administrative orders regarding those operations, and impose fees, fines, and penalties against federal agencies for non-compliance.<sup>374</sup> These enforcement options reinforce existing citizen suit provisions. Citizens can sue for non-compliance with the RCRA's requirements, and affected persons can sue to enjoin and force parties to clean up hazardous waste practices that "may present an imminent and substantial endangerment to health or the environment."<sup>375</sup>

A question that remains unanswered by either the RCRA or the FFCA is whether munitions constitute hazardous wastes.<sup>376</sup> Congress is sensitive to the issue. It directed the Administrator of the EPA to confer with the Secretary of Defense and state officials to decide the issue and promulgate regulations.<sup>377</sup> A recent federal court decision<sup>378</sup> found munitions were hazardous wastes for the purpose of a lawsuit based on the RCRA's imminent and substantial endangerment provision.<sup>379</sup>

Until the munitions issue is resolved, states may be able to use their public trust law to bolster their RCRA authority. States are free, in the absence of preemptive federal regulations, to impose more stringent standards upon hazardous waste generators that the RCRA imposes itself.<sup>380</sup> Protection of

public trust resources would justify such a move for hazardous waste activities that affect the trust corpus. By defining hazardous waste to include spent and dud munitions, states would subject military training to extremely cumbersome regulatory requirements; requirements which could include recovering spent and dud munitions from the seabed.<sup>381</sup> States can also use their public trust law to justify reducing the threshold from imminent and substantial endangerment to a lesser standard; one more protective of public trust resources. In either case, the impact on military training would be devastating.<sup>382</sup>

4. *Public Nuisance Law.*--Regardless of whether the EPA finds munitions to constitute hazardous waste, states may utilize their public nuisance statutes to reduce or eliminate military activities that cause munitions to come to rest in public trust waters.<sup>383</sup> Nuisance law may also present states with the ability to limit noise caused by military training, and to prevent military restrictions from interfering with commercial fishing and recreation. Congress has waived sovereign immunity for tort actions in the Federal Tort Claims Act (FTCA).<sup>384</sup> Courts have found state public nuisance laws to create cognizable causes of action under the FTCA.<sup>385</sup>

Unlike actions proceeding under the RCRA, there would be no need for states to wrestle with whether munitions are hazardous wastes. Instead, they need only prove that the military action unreasonably interferes with a public right. Public trust interests, such as commercial fishing and access to the trust

corpus, would supply the public rights in this equation. States would have to demonstrate that military training causes some harm. But a court may be inclined to reduce the degree of harm required in an effort to err in favor of preservation of public trust interests. Since national security is not a recognized public trust interest in state public trust law, the judicial balance would lean toward states.<sup>386</sup>

The remaining issue in a nuisance action would be preemption. Once again, the outcome would turn on whether a direct conflict existed between military training and the state's enforcement of its nuisance law. If the state attempted to preclude military training entirely rather than impose reasonable restrictions on it, a court would probably find the state law preempted.<sup>387</sup>

5. *Army Corps of Engineer Permits.*--In addition to using their public trust laws to regulate military activity directly, another means states can employ to protect their trust corpora is to force federal agencies to factor state public trust law into their land-use decisions.

Both the Rivers and Harbors Act<sup>388</sup> and the Federal Water Pollution Control Act<sup>389</sup> charge the Secretary of the Army, through the Army Corps of Engineers (ACOE), with making decisions regarding the use of navigable waters. Specifically, section 10 of the Rivers and Harbors Act authorizes the ACOE to issue permits for construction, excavation, or deposit of spoils in navigable waters, and for "any other work affecting the course,

location, condition, or capacity of such waters."<sup>390</sup> Under section 404 of the Federal Water Pollution Control Act, the ACOE is authorized to issue permits for the "discharge of dredged or fill material into the waters of the United States."<sup>391</sup> Federal agencies must secure permits in the same manner as private entities.<sup>392</sup>

Permit decisions flow from a two step process. The ACOE must first determine whether to allow the activity to proceed at all. If so, then the ACOE determines what restrictions to place on the permit. The vehicle the ACOE uses to make this decision is known as "public interest review."<sup>393</sup> That review is a "general balancing process" which "should reflect the national concern for both protection and utilization of important resources."<sup>394</sup> Among the factors the ACOE considers in the public interest review are impacts on "[f]ish and wildlife"; "scenic[] and recreational values"; compliance with the Coastal Zone Management Act; and "[o]ther Federal, state, or local requirements."<sup>395</sup> Unrecognized as a direct factor in the public interest review is national security.

The ACOE will consider state concerns about the pending permit even if states do not have a separate permit requirement of their own.<sup>396</sup> This is so because "[t]he primary responsibility for zoning and land use matters rests with state, local and tribal governments."<sup>397</sup> State concerns will normally prevail unless "significant issues of overriding national importance," such as "national security," are present in a sufficient degree

to counter those concerns.<sup>398</sup> Each public interest review is distinct. The weight assigned to a particular factor "is determined by its importance and relevance to the particular proposal."<sup>399</sup>

These permit decisions afford states a dual opportunity to utilize their public trust law to regulate or affect military activities. First, they can incorporate their public trust laws into their coastal management programs under the Coastal Zone Management Act. The ACOE has to consider a consistency determination in making the permit decision.<sup>400</sup> Secondly, state officials can communicate their concerns about the proposed military activity and its effect on public trust lands and waters directly to the ACOE. An ACOE official is then faced with balancing state interests against national security needs.

Although some may discount this opportunity because the ACOE is a Department of Defense agency, it gives the state yet another forum in which to advance its public trust interests. The ACOE is a distinct federal agency, obligated to consider all factors in its public interest review. Other Department of Defense agencies should not expect the ACOE to rubber stamp their Section 10 or Section 404 permit applications. Additionally, unlike the case with a consistency determination, the project's proponent is not the agency evaluating the state's public trust concerns.

6. *Special-use Airspace Determinations.*--Similar to the ACOE permit reviews are the Federal Aviation Administration's (FAA) reviews of requests for designation of special-use airspace.<sup>401</sup>

Special-use airspace consists of an imaginary three-dimensional box in the air that is restricted for a certain purpose, often military.<sup>402</sup> Designations flow from a formal rulemaking process.<sup>403</sup> Military agencies have to petition the FAA to designate the airspace and subsequently justify its continued existence via annual reports.<sup>404</sup>

States have the opportunity to comment on the airspace designation.<sup>405</sup> They can attempt to convince the FAA that a hearing is necessary before the FAA renders a decision. Hearings are discretionary,<sup>406</sup> but, if granted, they are usually held "in the vicinity of the affected airspace."<sup>407</sup>

In designating special-use airspace, the FAA must consider "the requirements of national defense, and of commercial and general aviation, and to the public right of freedom of transit through navigable airspace."<sup>408</sup> In so doing, it has wide discretion.<sup>409</sup> The FAA can revoke or modify special-use airspace designation "when required in the public interest."<sup>410</sup>

By submitting comments during the formal rulemaking process, states can attempt to demonstrate the adverse impacts military aviation activities will have upon their public trust assets. They can also point to conflicts between the proposed designation and state law and policy. For example, North Carolina has a policy limiting special-use airspace designations over its barrier islands.<sup>411</sup> If states can persuade the FAA to hold a public hearing, they can broaden the scope of their challenge from solely administrative to political, as well. State espousal

of public trust values carries considerable political weight, and may cause the FAA to scale down, if not deny, the military's special-use airspace request.<sup>412</sup>

7. *National Environmental Policy Act.*--Federal agencies must consider the impacts of their proposed activities upon the "human environment" in accordance with the National Environmental Policy Act (NEPA).<sup>413</sup> Agency consideration takes the form of informed decision making through the use of detailed written analyses supported by environmental studies. Three levels of analysis are possible:

(a) An environmental impact statement that comprehensively covers the environmental impacts of the proposed action and provides substantial opportunities for public comment and participation;<sup>414</sup>

(b) An environmental assessment that provides sufficient information to determine whether the proposed action will require comprehensive analysis via an environmental impact statement, or whether the proposed action will not significantly affect the human environment;<sup>415</sup> or

(c) A decision that the proposed action falls within those actions that the agency has determined are categorically excluded from NEPA analysis.<sup>416</sup>

The NEPA mandates no particular outcome. Instead, its purpose is to foster better decision making by federal officials.<sup>417</sup>

Although encouraged to protect and enhance the environment,<sup>418</sup>

agencies are free to choose any alternative so long as their decisions are properly documented.<sup>419</sup>

State public trust law plays a role in the NEPA process. At a minimum, federal agencies must consider the impacts their proposed actions will have upon state public trust resources. In addressing those impacts, federal agencies must also consider the significance attached to those resources under state law.<sup>420</sup> This may shift the balance when federal officials consider various alternative actions, as NEPA requires.<sup>421</sup>

State public trust law may also preclude a determination that the proposed action is categorically excluded from NEPA review. The Department of the Navy's NEPA regulations disallow use of a categorical exclusion when, among other things, the proposed action "[t]hreatens a violation of...state...law or requirements imposed for the protection of the environment."<sup>422</sup> As a result, federal agencies may have to allot the time and spend more money for environmental assessments when public trust resources are involved.

Finally, states can seek injunctive relief if federal agencies fail to comply with NEPA.<sup>423</sup> Failure to adequately consider state public trust resources and public trust law may cause a court to find the agency's actions deficient.

8. *Cooperative Land-use Agreements.*--Federal land use policy encourages military commanders to enter into cooperative agreements with state governments to better manage natural resources on military installations.<sup>424</sup> This may prove a useful



tool in negotiations to expand military training areas in America's coastal areas; a means to ensure states that military commanders will heed rather than ignore environmental concerns. But military officials should be careful when negotiating an interagency agreement of this nature. States may insert language into the agreement that appears innocuous yet applies state public trust principles to military land-use decisions.

Consider the holding in *National Audubon Society v. Superior Court of Alpine County*.<sup>425</sup> California's Supreme Court ruled that the State Water Resources Control Board could not divert water from Mono Lake's tributaries without considering the impacts of that diversion upon the public trust. Incorporation of state public trust principles into an interagency agreement might produce the same result. State officials, as trustees for the public, might have a quasi-due process right to compel military decision makers to at least justify in writing their land use decisions.<sup>426</sup> If the threshold that triggered the quasi-due process right was low enough, military commanders would have to justify their decisions in cases where neither NEPA nor Coastal Zone Management Act determinations were necessary.

9. *Inverse Condemnation*.--Military activities that disrupt the use of non-federal lands to such a degree that people can no longer use those lands for a reasonable purpose can result in a partial, unintentional taking of those lands.<sup>427</sup> This is sometimes referred to as inverse condemnation. Typically, inverse condemnation occurs when military aircraft overfly non-

federal lands at low altitudes and with such frequency and volume of noise that the lands below cannot be used for anything but growing crops. When inverse condemnation occurs as a result of aircraft overflights, the federal government obtains an avigation easement in the air above the property.<sup>428</sup>

Other invasions of non-federal property may also cause inverse condemnation.<sup>429</sup> In the context of this paper, states may have a partial taking claim if they can prove the buildup of spent and dud munitions on the floor of the marginal sea renders those lands useless for other purposes, such as commercial fishing.<sup>430</sup> A literal interpretation of the Submerged Lands Act vests coastal states with ownership of those lands, so it would appear states would be the proper parties to assert the claims.<sup>431</sup>

Military agencies could counter inverse condemnation claims in three ways. First, they could dispute the degree of invasion of the property. Secondly, they could argue that the United States' paramount right of national defense, as expressed in the Submerged Lands Act,<sup>432</sup> includes the right to partially take lands as necessary for military preparedness. This argument is weakened by the subsequent provision in the act which states that the federal government will purchase natural resources found in the marginal sea from the states.<sup>433</sup> Finally, military agencies could argue that the states have control, but do not own, the marginal seabed. An affirmative defense of non-ownership would force a court to resolve the question Supreme Court jurists have

danced around for many years: whether anyone can actually own the lands beneath the oceans.<sup>434</sup>

*C. Citizens' Suit to Challenge State's Public Trust Decision*

*Scenario: State and military officials have concluded a license agreement that authorizes military live-fire training in the state's coastal region. Training will affect public trust resources and impinge upon public rights of access and navigation, but the state agency is comfortable that the agreement contains sufficient restrictions to preclude any lasting harm to the trust corpus. An active citizen's environmental organization disagrees with the state agency. It brings suit to enjoin actions under the agreement.*

This scenario contemplates citizen enforcement of public trust rights. It is in this situation that the problematic nature of citizens being both the trustees and beneficiaries of the trust comes into play.<sup>435</sup> As indicated earlier, courts have found citizens do have standing to challenge governmental decisions regarding public trust resources.<sup>436</sup> If the federal government did not opt to intervene in the action on its own, the citizens might be able to force joinder under the Administrative Procedures Act.<sup>437</sup>

The key to this type of challenge is whether the citizens can convince a court that the state agency's action is tantamount to alienation.<sup>438</sup> If so, the court would carefully scrutinize the

transaction to determine if the alienation was in the public interest.<sup>439</sup> Prior federal and state agency decisions would carry little, if any, weight.<sup>440</sup> Military use of public trust lands should not be found violative of the primary purpose test, as national security is in everyone's interest. Military training is the essence of preparedness for combat. As opportunities to train decline, so does the security of our Nation. Nonetheless, a court could treat the United States as a proprietor in a real estate transaction rather than as a sovereign. This depends upon Congress' intent and the nature of the United States' interest in the land.<sup>441</sup> If Congress expressly authorized the military agency to acquire the land for national defense, then a court would probably treat the United States as a sovereign. On the other hand, if a military agency simply obtained a license from a state agency to use public trust lands, a court might take a more narrow view.

The citizens might then successfully argue that the state agency lacked authority to conclude the agreement. Citizens could assert one of two legal theories for this. First, the state legislature unconstitutionally delegated its alienation authority to a state agency.<sup>442</sup> Secondly, the citizens could argue the state agency exceeded its delegated power; its action was *ultra vires*. If, on the other hand, a court found the agreement was a mere license, it would likely reduce its level of scrutiny to a review for abuse of agency discretion.

#### *D. Federal Accommodation of State Interests*

One aspect of federal-state relations for which military attorneys should be prepared is accommodation. It may play a large role in any actual conflicts that parallel the scenarios just described. Assertion of superior federal authority over coastal lands and waters runs counter to a visible federal policy to accommodate state interests. This policy extends to all three branches of the federal government.

Federal jurists have subordinated federal rights to states through narrow rules of federal preemption.<sup>443</sup> States have been allowed to build bridges that interfere with navigation,<sup>444</sup> regulate fishing in U.S. territorial waters,<sup>445</sup> and control the anchorage and moorings of boats in areas subject to Coast Guard authority.<sup>446</sup> In the area of environmental regulation, states have been able to require federal agencies to obtain state permits.<sup>447</sup>

Executive branch policy is also accommodative. During the controversy over oil in offshore waters, President Truman signed the Pacific Marine Fisheries Compact to allow California, Oregon, and Washington to regulate fishing in coastal waters.<sup>448</sup> President Clinton recently made federal agencies subject to the chemical reporting requirements of the Emergency Planning and Community Right to Know Act,<sup>449</sup> in an effort to give state planners a better idea of what chemicals are present in their communities.<sup>450</sup> President Reagan even signed an executive order that requires federal agencies to adopt federalist policies,

Executive Order 12612.<sup>451</sup> Among other things, Executive Order 12612 establishes a presumption of state sovereignty "[i]n the absence of clear constitutional or statutory authority [to the contrary]."<sup>452</sup> To implement this policy, the order requires federal agencies to conduct a "Federalism Assessment" of any proposed policies, regulations, or legislation.<sup>453</sup>

In those instances when both the executive and judicial branches have found it proper to subordinate states' environmental requirements to federal power, Congress has responded to adjust the balance to favor the states. Congress responded in this manner following the Supreme Court's ruling in *United States v. California*.<sup>454</sup> The result was the Submerged Lands Act. Congress also amended the Coastal Zone Management Act in 1990 to overturn the result of *Secretary of the Interior v. California*,<sup>455</sup> thereby extending state influence over federal activities. Lastly, Congress responded to the Court's findings that neither the Clean Air Act nor the Resource Conservation and Recovery Act completely waived sovereign immunity with amendments to reverse those findings.<sup>456</sup>

Policies of accommodation in all three branches of the federal government make it difficult for military leaders to effectively voice their concerns over state impairment of coastal training activities. Even if those concerns funnel their way out of the Department of Defense and meet with the president's approval, it is unlikely Congress would respond favorably.<sup>457</sup>

## V. RECOMMENDED ACTION -- EXCLUSIVE DEFENSE AREAS

Despite this hesitancy to use federal power to eclipse that of the states, there is a need for coastal training areas that give military commanders sufficient flexibility to train realistically. This need will grow as pressures on coastal areas increase and military budgets decline. Appended to this paper is a draft bill that would create Exclusive Defense Areas in the marginal sea. If enacted, the statute would place certain marginal waters under the control of the Department of Defense as an exercise of the federal government's paramount powers. Military actions would be subject only to review by other federal agencies. States would have no role under the Coastal Zone Management Act, the Submerged Lands Act, or their respective public trust laws.

Support for this type of legislation is likely to be sparse, unless the United States is suddenly thrust into a large armed conflict. Unless that happens, accomodation of state interests will continue. But there is another alternative. A court could wrest control of trust assets in the marginal sea from states by creating a federal public trust doctrine.

## VI. IS THERE A FEDERAL PUBLIC TRUST DOCTRINE?

There is not a recognized public trust doctrine in federal common law, yet the law is poised to move in that direction. Federal land-use statutes recognize many of the same interests that the public trust doctrine seeks to uphold. People are

calling for a uniform system to ensure the wise use of lands and waters. Judges have for a long time referred to the federal government as generally holding public lands and waters in trust for the people. Within the geographic reach of the state public trust doctrine, the federal government has its navigational servitude: a dominant interest in land very similar to the *jus publicum*. Given the appropriate facts, a court could expand the navigational servitude into a federal public trust doctrine as a logical progression of the law.

For many years Supreme Court justices have referred to the federal government's obligation over public lands and waters as a trust obligation.<sup>458</sup> The manner on which they use the word trust, however, is most often casual and with little elucidation.<sup>459</sup> No distinction has been made between public lands and navigable waters; this offhand reference to a trust appears to apply to both.

Once called upon to actually render a decision about the existence of a federal public trust doctrine, lower court judges have moved more cautiously. In its suit to force Air Florida to remove the debris from a fallen jetliner in the Potomac River, the District of Columbia belatedly attempted to assert a federal public trust claim on appeal. The court responded,

Our decision not to consider the District's public trust claim is reinforced by our belief that the argument that public trust duties pertain to federal navigable waters...raises a number of very difficult



issues concerning the rights and obligations of the United States (which is not a party here), the creation of federal common law, and the delegation of trust duties to the District.<sup>460</sup>

Rather than create a federal public trust doctrine, some judges would prefer to rely on federal statutes. As noted above, many federal statutes have public trust values imbedded in them, so courts see no need to address similar issues in a common law vice statutory context.<sup>461</sup>

Two cases have holdings that recognize a federal public trust doctrine: *In re Steuart Transportation Company*<sup>462</sup> and *United States v. 1.58 Acres of Land*.<sup>463</sup> In *Steuart*, the court found the United States and Virginia had claims based on either public trust law or a *parens patriae* theory to recover money damages for the destruction of waterfowl caused by an oil spill. The court's analysis is brief. It recognized that the governments did not own the birds. Unwilling to leave the birds unprotected, however, the court found them a resource protected by public trust law.

The issue in *1.58 Acres* was not enforcement of a federal right, but a condemnation action by the federal government. The court found the United States took the land from Massachusetts subject not to the Commonwealth's public trust interest, but subject to a joint public trust interest. It found the United

States and Massachusetts were co-trustees of the same trust corpus. The federal government's trust duties pertained to commerce, navigation, and national defense, while the Commonwealth's duties pertained to all else.

At first, this division of trust duties and responsibilities sounds appealing, a nice compromise. But a closer look finds it both impractical and unsound. As the District Court in *1.58 Acres* relied on Justice Black's opinion in *United States v. California*,<sup>464</sup> it is best to start there to uncover the flaws in the co-trustee theory.

Justice Black was moving toward a federal public trust doctrine. Whether he did so unwittingly or purposely stopped short of such a move will probably never be known. But consider for a moment his decision and the events that took place in its aftermath; they loosely fit into a public trust paradigm. Justice Black found the coastal areas of the United States were of prime importance to the federal government for national defense and international relations purposes. He intimated the resources underlying coastal waters were held in trust for the benefit of all Americans. Individual states were not legally competent to control the exploitation of those resources -- devalue the corpus of the trust -- because they did not act for the benefit of the entire citizenry of the United States as trust beneficiaries.

Congress responded to *United States v. California* with the Submerged Lands Act. In that act, *Congress*, as the spokesman for

the sovereign people, determined states could play an appropriate role in the administration of natural resources in the marginal sea. It declared the states owned the lands under the marginal sea, subject to the exercise of certain paramount authority by the United States. This appears consistent with the Court's treatment of alienation of public trust lands in *Illinois Central Railroad v. Illinois*; only a legislative body representative of the entire beneficiaries can alienate public trust lands, and then only when to do so "promotes the interest of the public" or does not "substantial[ly] impair[...the public interest in the lands and waters remaining."<sup>465</sup> Here, Congress was certainly the appropriate legislative body to take action, and its action arguably promotes the public interest.

Thus both the Supreme Court's and Congress' treatment of the dispute over oil in the submerged lands under the marginal sea is roughly consistent with a federal public trust doctrine. But the parallels end there. Rough consistency is not legal equivalency.

If a federal public trust doctrine exists, it must fit within the framework of the Submerged Lands Act and the judicial decisions that surround it. Returning to *United States v. California*, Justice Black's reference to the federal government holding lands "in trust" for the American people must be taken in context.<sup>466</sup> He used those words in response to an argument by California that the United States had sat on its rights. In voicing his disagreement, Justice Black noted that the equitable defenses of laches, estoppel, and adverse possession do not bar a

claim by the United States. The federal government's rights cannot be abridged by persons not authorized by Congress to waive them. This is a principle based on sovereignty; it is not unique to public trust law.<sup>467</sup> Additionally, the way in which Justice Black used the word trust was as casual as in other Supreme Court opinions.<sup>468</sup> He certainly made no effort to directly connect his paramount powers doctrine to the public trust doctrine.

Paramount powers theory differs from public trust law in that it connotes no obligation to preserve trust resources or to use them wisely. All Supreme Court decisions that use trust-like language concerning public lands give Congress unlimited authority to make land-use decisions.<sup>469</sup> No judicial check on legislative power resides in the paramount power theory. This directly contradicts the Court's own role in *Illinois Central*.

Indeed, the Submerged Lands Act simply gives the coastal states the natural resources and submerged lands under the marginal sea to use as they wish. True, they cannot impede navigation, commerce, or national defense, but these federal interests do not stand in the way of utter depletion of a resource.<sup>470</sup> Only the individual states' public trust laws do that, laws which states can water down without federal intervention. Coastal states are thus free under the Submerged Lands Act to use littoral resources without regard to the needs or desires of the inland states.

This freedom contravenes the public trust doctrine. Public trust law requires governments to preserve trust resources for

use by all beneficiaries, not a select few.<sup>471</sup> While *Illinois Central* implies a state can delegate its public trust authority to a municipal government for a short time, the decision does not authorize complete abdication of state authority over submerged lands and their resources. Had the *United States v. California* Court created a federal public trust doctrine, it would have a corresponding rule against abdication of power to lesser governments. The Court would then have been forced to strike down the Submerged Lands Act as an unconstitutional extension of Congress' power. This did not occur.<sup>472</sup> In fact, in *Alabama v. Texas*, the Court found the Submerged Lands Act constitutional precisely because Congress has unlimited power over federal property.

Aside from the unsound reasoning of *1.58 Acres*,<sup>473</sup> the co-trustee concept it espouses is impractical. One sovereign has to decide what is best for the trust, not two. A joint decision by sovereigns with sometimes divergent interests begs for compromise; compromise decisions would serve only to gradually diminish the trust's value.

The method the *1.58 Acres* court suggests to divide trustee responsibility is equally unsatisfactory. By limiting the federal sphere of concern to national defense, navigation, and commerce -- commerce in the sense expressed in the Submerged Lands Act -- the United States lacks the power to protect the trust corpus for all Americans. On the other hand, to use a definition of commerce that is as broad as Congress' Commerce

Clause power leaves the coastal states with virtually no role in the administration of the trust.

Worst of all would be to split the difference. To allow the states to administer the trust for "non-preempted subjects" as the *1.58 Acres* court suggests, is to require the co-trustees to examine each application of the doctrine using a lengthy preemption analysis before turning to the public trust issue at hand. The practical result of the co-trustee notion is that it would delay decisions and undermine the value of the trust corpus.

Unsatisfactory as the *1.58 Acres* decision is, it does indicate courts are thinking about a federal public trust doctrine. Both Congress and the president are conscious of public trust principles and duties as well. A number of federal statutes contain provisions which serve to protect interests also protected by the public trust doctrine. Highlighted in this paper is the Coastal Zone Management Act, but it is far from the only one. The legislative history of the Submerged Lands Act contains many references to public trust interests.<sup>474</sup> Public trust interests are found in the National Environmental Policy Act,<sup>475</sup> the Federal Land Policy and Management Act,<sup>476</sup> the National Park Service Organic Act,<sup>477</sup> the Federal Water Pollution Control Act,<sup>478</sup> the National Marine Resources Protection Act,<sup>479</sup> and the Rivers and Harbors Act.<sup>480</sup> In his Presidential Proclamation creating a 200 nautical mile exclusive economic zone in the nation's contiguous waters, President Reagan announced the United

States "has... sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil...and jurisdiction with regard to...the protection and preservation of the marine environment."<sup>481</sup> From these citations it is clear our national leaders, both legislative and executive, see the federal government as having some role in protecting public trust interests, even out to areas 200 nautical miles distant from America's coasts.

A federal public trust doctrine would enhance rather than be subsumed by these statutes and the proclamation. Courts could utilize a federal public trust doctrine to ensure trust values are not denigrated by gaps between the statutes or technical loopholes in a single statute. Additionally, when two federal statutes conflict, courts could call upon the federal public trust doctrine to effect a balance that best preserves the trust corpus.<sup>482</sup>

It is now apparent that although a federal public trust doctrine does not currently exist, such a doctrine could be of value. One question remains, however: how can a court create a federal public trust doctrine that does not conflict with the purpose behind the Submerged Lands Act? The answer may lie in expansion of the federal government's navigational servitude.

Every piece of land, private or governmental, underlying navigable waters is subject to the federal government's dominant navigational servitude. In this manner, it is like a state's *jus*

*publicum*. There are, however, differences between the two. The navigational servitude creates no right in the people. Its principle purpose is to foster navigation, but it may reach into those broad areas of public concern embraced by Congress' Commerce Clause power.<sup>483</sup> Additionally, the servitude imposes no limit on Congress' powers to alienate lands beneath navigable waters.

These differences do not create an unbridgeable gap, nor even a large one. If limited to waters seaward of the low water mark,<sup>484</sup> the federal government's paramount powers come into effect.<sup>485</sup> By linking the navigational servitude with paramount powers theory, all but one of the differences disappear.

Justice Black created the paramount powers doctrine based upon the premise that no person or government owns the lands underlying the world's oceans. These lands are for all the people to enjoy. Yet to provide for their care and ensure their proper management, Justice Black realized they must be controlled by someone. Because these resources are primarily utilized for interstate and international commerce and comprise an area vital to national defense, he reasoned the federal government was the logical choice.

The Supreme Court has never expressly repudiated Justice Black's non-ownership theory.<sup>486</sup> Alienation of large portions of the marginal seabed to a private party would contradict this theory directly. Thus it is a simple task to limit alienation of



the marginal seabed to the same exceptions placed upon lands subject to public trust law by the Court in *Illinois Central*.

Preservation of the resources in the marginal seabed was the primary reason behind the Court's *United States v. California* opinion. Since courts have already held that the navigational servitude encompasses commerce and those things that substantially affect commerce, it is not difficult to expand the servitude to encompass all of the interests protected by the public trust doctrine. Both are creatures of common law; both can change to reflect the needs of society.

Balancing is also a part of the paramount powers doctrine. The Supreme Court did not expect the federal government to authorize the wholesale exploitation of offshore oil deposits when it ruled against California. That was the federal government's chief fear if the Court left the deposits in California's hands. Rather, the Court had to anticipate some balancing of interests would occur when the lands came under federal control. By combining this implied need to balance under *United States v. California* with the express need to do so in the case of the navigational servitude, one arrives at the type of balancing of interests expected under public trust law.

Missing from this merger of paramount powers theory and navigational servitude law is the public's right to contest land-use decisions under the public trust doctrine. This deficit can be overcome by borrowing federal common law standing rules and incorporating them into the newly formed federal public trust

doctrine. Standing rests primarily on whether the plaintiff has an interest within the "zone of interests" the federal law seeks to protect.<sup>487</sup> Courts construe the answer to this question liberally. Society has a high degree of concern for the environment and courts appear unwilling to thwart that concern through rigid standing rules.<sup>488</sup> Like the assets in state public trust corpora, the assets in the marginal sea are there for all people. It would be absurd to entrust the management of those resources to the federal government and then restrict people from contesting their misuse. Instead, it would make perfect sense to find preservation of the marginal sea and its resources within the zone of interest of every American and allow each citizen the opportunity to enforce federal public trust law.<sup>489</sup>

Last among the hurdles to surmount in creating a federal public trust doctrine applicable to the marginal sea is the Submerged Lands Act. This is not easily overcome. That act's purpose is was to return control of the assets in the marginal sea to the coastal states. Creation of a federal public trust doctrine would tend to reverse the situation once again. With the help of a little writer's license, however, this apparent contradiction can be made to vanish and the last obstacle overcome.

Imagine for a moment that a federal public trust doctrine was firmly in place before the federal-state dispute arose over offshore oil. Faced with the same decision over control of oil deposits off California's shoreline, the Supreme Court would have

reached the same conclusion it did in *United States v. California*, but for a different reason. As a part of the federal trust corpus, there would be no doubt that the federal government had the clear right to the oil. California would have been on notice that the federal government had a dominant interest in the land, a federal *jus publicum*. Imagine further, that Congress recognized the validity of the Court's decision. But, as the body vested with the people's will to manage the federal trust corpus, Congress then determined it in the best interest of the people to delegate management of oil deposits in the marginal sea to the coastal states. With less fanfare and emotion than actually occurred, Congress then enacted the Submerged Lands Act.

Viewed in this way, the Submerged Lands Act is a narrow statutory exception to federal public trust law: an exception to the rule that the federal government must manage trust resources. As with other owners of lands encumbered by the public trust, the coastal states have only a *jus privatum* interest in the lands.<sup>490</sup> Congress has looked at the issue and struck a balance. States can manage offshore oil deposits as well as the other natural resources in the marginal sea, as long as the federal government itself does not need the resources. The provision in the Submerged Lands Act that allows the federal government to purchase natural resources "in time of war or when necessary for national defense" becomes a policy decision by Congress to compensate the states for the resources rather than simply take them without payment as the public trust doctrine allows.<sup>491</sup>

This imaginary construct squares with the Supreme Court's analysis of the Submerged Lands Act. Congress did not abdicate its constitutional role in ceding authority to the states. Instead, it exercised its paramount (or public trust) powers and delegated its authority to the coastal states. If the people become displeased with the way in which coastal states manage these resources, Congress has the power to revoke the grant of authority; it can repeal the act.<sup>492</sup>

If presented with the appropriate facts, a court could now create a federal public trust doctrine that does not have the legal or practical shortcomings of the *1.58 Acres* decision. From the coastline seaward to three miles, coastal states would manage the use and exploitation of natural resources for the federal government. Management of resources seaward of three miles would lie, as it does today,<sup>493</sup> with the federal government itself.<sup>494</sup>

One of the interests protected by the federal public trust doctrine would be national defense. Although this represents an expansion of the reasons for use of the navigational servitude,<sup>495</sup> it would not come as a complete shock to states.<sup>496</sup> Virtually all federal environmental and land-use statutes have a national defense exemption.<sup>497</sup> States are required to give priority to the siting of national defense facilities under the Coastal Zone Management Act.<sup>498</sup> And the Submerged Lands Act itself retains the federal government's "rights and powers of regulation and control...for the constitutional purpose[] of...national defense."<sup>499</sup> Creation of a federal public trust doctrine would

give substance to that heretofore nebulous phrase. When necessary to ensure the United States armed forces have suitable training areas, the federal government would be able to exercise its *jus publicum* rights and take the lands without compensation; compensation for the natural resources would be made as required by the Submerged Lands Act or adequate access would be made to allow their continued exploitation. Ultimate control of the lands and waters would rest, as it should, with the federal government.

A federal public trust doctrine would not impose additional restrictions on military activities in the coastal areas of the United States. Instead, it would give military commanders more flexibility in land-use decisions. Under the Coastal Zone Management Act, all federal activities in the coastal zones of each state must already be consistent with that state's public trust law.<sup>500</sup> Federal public trust law would likely be a conglomeration of borrowed states' law, so it would represent nothing new. Its singular difference would be to recognize national defense as a protected public interest. This would benefit those military installations that are subject themselves to state public trust law,<sup>501</sup> because federal trust law would preempt state trust law where the two conflicted.

Additionally, federal public trust law could also alter the outcome of military agencies' consistency determinations. As a body of federal law, the federal public trust doctrine would become "existing law applicable to [] [f]ederal agency[]

operations."<sup>502</sup> If it required a federal agency to take an action that state law, public trust or otherwise, prohibited, the federal agency could ignore the state law. This is so because the federal public trust law would trigger the "maximum extent practicable" exception for consistency under the Coastal Zone Management Act.<sup>503</sup> Such a divergence could arise over a defense need to operate a coastal training area twenty-four hours a day. State law might deem such a need inconsistent with the recreational and ecological requirements of the area by not giving any weight to national defense matters.<sup>504</sup> A federal public trust doctrine, on the other hand, would attach significant weight to national defense. The federal decision maker would then not have the discretion to ignore national defense. All of the nation's needs as enunciated under the federal public trust doctrine would receive appropriate consideration; a fitting outcome as "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone."<sup>505</sup>

## VII. CONCLUSION

Public trust law puts the state in a unique position with its citizens: that of trustee to beneficiary. State governments have the duty to preserve or use wisely those resources which fall within the trust's scope. Because the public trust doctrine is a body of common law, both the character of the trust corpus and the interests the doctrine is designed to protect can vary.

Today, the doctrine encompasses conservation of states' coastal resources.

Military units need to train in the Nation's coastal areas in order to be ready to fight in the littoral areas of the world. Amphibious warfare training exercises are likely to conflict with states' duties to preserve trust corpora. When they do, states can use a variety of legal mechanisms to enforce their public trust law. Federal agencies, including the military departments, are not immune from state laws merely because of their status. To the contrary, a federal policy of accommodation cuts against using federal supremacy as a shield. Only in the rare case of a state banning military training in its coastal areas, would federal law preempt state public trust law. In all other case, military planners should be prepared to address public trust concerns.

Lurking in the shadows is a federal public trust doctrine. If courts bring it to light, this new doctrine will serve military planners well. It would place national defense squarely within those interests protected by the public trust doctrine. This contrasts sharply with state public trust laws. But the contrast ends there. For the ultimate purpose of a public trust doctrine, state or federal, is to ensure our coastal resources are wisely managed. A federal public trust doctrine would simply put the onus of balancing the interests in our Nation's coastal waters where it belongs --with the federal government.

1. Commercial fishing is a multi-billion dollar industry in the United States. The current Administration believes the industry is mismanaged at the national level and hopes to correct the situation. *Reauthorization of Ocean and Coastal Programs, 1993: Hearings Before the Subcom. on Oceanography, Gulf of Mexico, and the Outer Continental Shelf of the House Merchant Marine and Fisheries Comm.*, 103d Cong., 1st Sess., (1993) (statement of Diana H. Josephson, Deputy Undersecretary for Oceans and Atmosphere, Nat'l Oceanic and Atmospheric Admin.).

2. Offshore oil exploration has been an important aspect of coastal area management for some time. See ERNEST R. BAILEY, *THE TIDELANDS OIL CONTROVERSY* chapter 8 (1953). Efforts to find offshore oil deposits intensified following the 1973 Arab oil embargo. S. REP. NO. 277, 94th Cong., 2d Sess., 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1777 [hereinafter S. REP. NO. 277].

3. Congress is concerned over dwindling public lands along America's coasts. 136 CONG. REC. H8071 (1990). Through federal grants, Congress encourages states to acquire coastal lands in order to preserve or restore their "conservation, recreational, ecological, or esthetic values." 16 U.S.C. §1455a(b)(1) (West Supp. 1993).

4. Naval services include the Marine Corps and the Navy, 10 U.S.C. §5061 (West Supp. 1993), and, upon a declaration of war or



when determined by the President, the Coast Guard. 14 U.S.C. §3 (1988).

5. Littoral means "pertaining to the shore of a lake, sea, or ocean." THE RANDOM HOUSE COLLEGE DICTIONARY 783 (rev. ed. 1980). In a military context, littoral can mean within 650 nautical miles of the coastline. DEPARTMENT OF THE NAVY, FROM THE SEA 6 (1992).

6. *E.g.*, UNITED STATES MARINE CORPS, FMFM 1-2, THE ROLE OF THE MARINE CORPS IN THE NATIONAL DEFENSE ¶ 3006.e (1991); ALLAN R. MILLETT, SEMPER FIDELIS: THE HISTORY OF THE UNITED STATES MARINE CORPS (1980).

7. DEPARTMENT OF THE NAVY, *supra* note 5, at 3.

8. *See, e.g.*, Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Title XXIX, §§ 2901-2926, § 2921, 104 Stat. 1496 (1990); *See also* Juan J. White, *More Overseas Bases Closing*, USA TODAY, July 2, 1993, at 1A.

9. David Chew, *Coastal Areas Face Threat of Destruction*, THE STRAITS TIMES, Mar. 23, 1994, at 9.

10. CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK xxxiv (1990) [hereinafter PUBLIC TRUST DOCTRINE].

11. I define the corpus with more particularity, *infra*, part II.D.

12. Public trust doctrine varies from state to state. Phillips Petroleum Co., Inc. v. Miss., 484 U.S. 469, 475 (1988). Judges and commentators alike stress the need to examine the law of the state in which the dispute arises. Shively v. Bowlby, 152 U.S. 1, 26 (1894), 4 WATERS AND WATER RIGHTS §30.02(b) (Robert E. Beck, ed. 1991), PUBLIC TRUST DOCTRINE xxxvi. In this paper, I try to define the public trust doctrine by describing the outer reaches of its power and applicability. Underlying the entire paper is the question of the public trust doctrine's application to military activities. Therefore, some of the aspects of the public trust doctrine which I point out may represent extreme viewpoints. I make no claim to have developed a mainstream body of public trust law applicable in all fifty states.

13. California's Supreme Court describes the public trust doctrine as "more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty to of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 724 (Cal. 1983).

14. MOLLY SELVIN, THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789-1920, preface, 2 (1985).

15. PUBLIC TRUST DOCTRINE, *supra* note 12, at 4 and 60; SELVIN, *supra* note 14, at 17. But Professor Sax cautions, "neither Roman Law nor the English experience with lands underlying tidal waters is the place to search for the core of the trust idea." Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186 n.6 (1980). Sax cautions against relying solely upon history to discover the "core of the trust idea." *Id.* Instead, look to its purpose. He argues the public trust doctrine slows the transformation of land over which the public has expectations from a "revolutionary" to an "evolutionary" pace. "The function of the Public Trust as a legal doctrine", Sax asserts, "is to protect such public expectations against destabilizing changes." *Id.* at 188.

21. *Id.*

17. SELVIN, *supra* note 14, at 17.

18. Sax, *supra* note 15, at 189. Professor Sax indicates feudal law provided common areas for people to graze their animals, to fish, to hunt, and to cut peat for fuel.

19. SELVIN, *supra* note 14, at 24.

20. *Id.*

21. PUBLIC TRUST DOCTRINE, *supra* note 12, at 7.

22. SELVIN, *supra* note 14, chapters 1 and 2.

23. *Id.* See section II.D, *infra*, for additional discussion of the public trust doctrine as a policy tool.

24. *Arnold v. Mundy*, 6 N.J.L. 1 (1821).

25. 41 U.S. (16 Pet.) 367 (1842).

26. In this paper, I use "tidelands" to refer to lands which lie between the high and low water marks of the oceans. Distinguish these from "submerged lands" which are those lands seaward of the low water mark. Tidelands are periodically exposed to the air. Submerged lands are always covered by water.

27. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 409 (1842).

28. *Martin*, 41 U.S. at 411.

29. Justice Thompson pointed out in his dissent, "The absolute ownership could not be expressed in a more full and unqualified a manner." *Martin*, 41 U.S. at 429.

30. Apparently the Court thought the King anticipated the American Revolution in his 1664 grant. The deed was not to be looked at as a deed conveying private property, but rather as "an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411-12 (1842).

31. The Court recently reiterated this longstanding principle in *Phillips Petroleum Co., Inc. v. Mississippi*, 484 U.S. 469 (1988). Generally, neither a state nor the federal government can take private property without compensation. U.S. CONST. amends. V and XIV.

32. Before leaving *Martin v. Waddell*, there are two other items worth noting. The Court reiterated the rule of construction to construe grants of public lands to avoid conveying the *jus publicum*. 41 U.S. (16 Pet.) 367, 410 (1842). Second, the took 11-1/2 pages to summarize the facts. In-depth title research appears to be a common factor in public trust cases -- one which may complicate public trust litigation involving military installations. See, e.g., the statutes that created U.S. Navy Base, Norfolk, Virginia. Act of March 20, 1794, ch. IX, 1 Stat. 345; and Pub. L. 73-347, 48 Stat. 957 (1934). Further complicating title research will be the manners in which the United States acquires lands. See *infra* part III.A.2(d).

33. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

34. 44 (3 How.) U.S. 212 (1845).

35. *Id.* at 223.

36. In dicta, the Court indicated the United States lacked the power to transfer both the *jus privatum* and the *jus publicum* to a private party.

To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.

Pollard's Lessee, 44 U.S. at 230. This was corrected in *Shively v. Bowlby*, 152 U.S. 1 (1893), where the Court held the United States had the power to grant title to lands below the high water mark in fee simple to a private grantee. The lands involved in *Shively* lay along the Columbia River in the Oregon Territory. Exactly what power Congress has in this area remains unsettled. *See infra* section VI.

37. *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1986); *Kleppe v. N.M.*, 426 U.S. 529 (1976); *United States v. La.*, 339 U.S. 699 (1950); *United States v. Tex.*, 339 U.S. 707 (1950); *United States v. Cal.*, 332 U.S. 19 (1947); *Shively v. Bowlby*, 152 U.S. 1 (1893); *State of Nev. v. Watkins*, 914 F.2d 1545 (9th Cir. 1990).

38. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845).

39. *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 435 (1892); *Stockton v. Baltimore and N.Y. R.R.*, 32 F. 9 (C.C. N.J. 1887); *People v. California Fish Co.*, 138 P. 79, 89 (1913). *See infra* notes 468-469 and accompanying text.

40. 146 U.S. 387 (1892).

41. Act of Sept. 20, 1850, ch. 61, 9 Stat. 466.

42. *Ill. Cent.*, 146 U.S. 387, 398-99 (1892).

43. *Ill. Cent.*, 146 U.S. at 448 (quoting Section 3 of the Lake Front Act, *Ill. Laws of 1869*, 245).

44. *Id.*

45. Ill. Cent. R.R. v. Ill., 146 U.S. 387, 407 (1892) (citing section 6 of the Lake Front Act, Ill. Laws of 1869, 245). In addition to the balance due up front, the railroad was to pay seven percent of its gross earnings to the state in perpetuity. *Id.* at 448 (citing section 3 of the Lake Front Act).

46. Ill. Cent. R.R., at 411, (citing Ill. Laws of 1873, 115).

47. Justice Field noted "it was impossible to bring [the United States] in as a party without their consent." Ill. Cent., 146 U.S. at 433. Had the United States been a party, the Court would have been in a position to answer significant questions discussed throughout this dissertation concerning the relationship between a state and the federal government in the administration of public trust lands.

48. U.S. CONST. art. I, § 10, cl. 6.

49. U.S. CONST. amend. XIV.

50. The state's argument here was specious because it referred to a provision in the 1870 Illinois Constitution. The Lake Front Act was passed in 1869. Justice Field quickly discarded this argument and found the 1869 act procedurally valid. Ill. Cent. R.R. v. Ill., 146 U.S. 387, 451 (1892).

51. Ill. Cent. R.R. v. Ill., 146 U.S. 387, 430 (1892).

52. Ill. Cent., 146 U.S. at 420-22. The City then went on to characterize the conveyance in a number of ways: the railroad took the land as a quasi-public agency; the railroad had a mere

license; the state just gave the railroad an uncharacterized ability to use the land under its police power; the railroad had an easement; the state simply made a revocable gift of the property. *Id.* at 423-8.

53. Justice Field found no violation of the Contract Clause or the due process because the state always had title to the lakebed --the attempted grant was "if not absolutely void on its face,...subject to revocation." *Ill. Cent. R.R. v. Ill.*, 146 U.S. 387, 453 (1892).

54. *Id.* at 453-54.

55. Justice Field wrote,

The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the land and waters remaining.

*Ill. Cent.*, 146 U.S. at 453. At least one commentator believes that the second exception -- disposition without impairment of the public interest -- is limited to "small parcels" of submerged lands. PUBLIC TRUST DOCTRINE, *supra* note 12, at 178. I read no such limitation in the Court's language. Does a state violate the public trust doctrine if it leases a 1,000 acre strip of tidal land (the amount involved in *Illinois Central*) to the military for installation and use of aviation electronic warfare



training devices? Would that substantially impair the remaining public trust waters? Does it matter whether the public can still fish in the area? If the area is restricted to fishermen, but the restriction also serves to conserve wildlife, is that sufficient? Justice Fields' opinion answers none of these questions. Only through specific inquiry into the details of each case can a court determine whether a property transaction violates the public trust doctrine. *But see County of Orange v. Heim*, 106 Cal. Rptr. 825 (4th Dist. 1973).

56. Ill. Cent., 146 U.S. 387, 452-53 (1892).

57. *Id.*

58. *See supra* note 60.

59. The area that the Illinois Legislature attempted to convey to the railroad was

as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly if not quite equal to the pier area along the waterfront of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York and Boston combined.

Ill. Cent., 146 U.S. 387, 454 (1892). Justice Shivas in dissent chastised the majority for its emphasis on the economic value of the harbor. Either the public trust doctrine prevented the

transfer of the land or it did not. The size or value of the land should be irrelevant. *Id.* at 467. *See supra* note 55.

60. *Ill. Cent. R.R. v. Ill.*, 387, 455 (1892) (emphasis added).

61. U.S. CONST. art. IV, § 3, cl. 2. I discuss Congress' Property Clause powers further in section III.A.2(b), *infra*.

62. *See supra* note 12.

63. New Jersey's Supreme Court recognized this aspect of the public trust doctrine in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972). "It is safe to say...that the scope and limitation of the [public trust] doctrine in this state have never been defined with any great degree of precision. That it represents a deeply inherent right of the citizenry cannot be disputed." *Id.* at 53.

64. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 486 (1988) (O'Connor, J., dissenting).

65. *Hardin v. Jordan*, 140 U.S. 371, 383-84 (1891).

66. *Barney v. Keokuk*, 94 U.S. 324 (1877). *See also*, *Ill. Cent. R.R.*, 146 U.S. 387, 435-37 (1892).

67. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

68. *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 721 (Cal. 1983).

69. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

70. *Id.* at 481 (quoting *Kaiser Aetna Insurance Corp. v. United States*, 444 U.S. 164, 183 (1979) (Blackmun, J. dissenting)).

71. Indeed, the dissenters in *Phillips Petroleum* (Justice O'Connor wrote the dissenting opinion and was joined by Justices Scalia and Stevens) viewed the majority's expansion of the public trust corpus as a means to allow opportunistic states to take land without just compensation. Justice O'Connor adheres to the historical view: "Navigability, not tidal influence ought to be acknowledged as the hallmark of the public trust." *Id.* at 493-94.

Another aspect of the public trust doctrine illuminated by *Phillips Petroleum* is its harsh treatment of private property owners. The owners of the property in *Phillips Petroleum* had held title to the land and paid taxes on it for 100 years. In justifying its use of public trust law to extinguish their rights, the Court pointed out that Mississippi law on this matter had been clear for some time. Accordingly, the owners should have been on notice that they held merely the *jus privatum* in the land. *Phillips Petroleum v. Miss.*, 484 U.S. 469, 483 (1988).

72. *See, e.g.*, *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981); *United State v. Anderson*, 736 F.2d 1358 (9th Cir. 1984); *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983).

73. The seaward reach of the doctrine for coastal states is three nautical miles except for Florida's and Texas' jurisdiction

into the Gulf of Mexico, where the outward reach is twenty-seven miles. See *infra* note 232 and accompanying text.

74. This refers to the highest point water reaches along the shore of a lake, river, or ocean. Under federal law, it is the average high water mark as measured over an 18.6 year period. *Borax Ltd. v. Los Angeles*, 296 U.S. 10 (1935). See also, *WATERS AND WATER RIGHTS*, *supra* note 12, at 59. The difference between the high and low water marks can be the result of rainfall or other changes in river or lake levels. Thus the term high water mark is not limited to areas influenced by the tide.

75. See, e.g., *Avon-by-the-Sea*, *supra* note 63. The authors of *PUBLIC TRUST DOCTRINE*, *supra* note 15, indicate this may be a trend. "A growing number of States recognize some public trust interests in privately owned 'dry sand' areas immediately upland of the mean high tide line, usually extending up to the vegetation or debris line." *Id.* at 57. See *infra* section II.D.3(a) and notes 343-355 and accompanying text.

76. Fastlands are those dry lands inland of the high water mark. (Source ???)

77. *Utah v. United States*, 403 U.S. 9 (1971); *State of Alaska v. United States*, 662 F.Supp. 455 (D. Alaska 1987) *aff'd* 891 F.2d 1401 (9th Cir. 1989).

78. Accretion is the gradual creation of dry lands from sediment carried by water. Accreted lands generally fall out of the trust

corpus. *Hilt v. Weber*, 233 N.W. 159 (1930). Conversely, erosion enlarges the trust corpus. *Napeahi v. Paty*, 921 F.d 897 (9th Cir. 1990). Sudden changes in lands because of storm, floods, or man's actions (e.g., filling tidelands for construction) do not alter the geographic reach of the public trust doctrine. *City of Alameda v. Todd Shipyards Inc.*, 632 F.Supp. 333, 335 (N.D. Cal. 1986). See generally, PUBLIC TRUST DOCTRINE, *supra* note 12, chapter II (geographic scope of public trust doctrine).

79. Once a waterway has been determined to be navigable, the entire lateral extent of the waterway lies within the scope of the public trust, not just the navigable portions. *Swan Island v. Club, Inc. v. White*, 114 F.Supp. 95 (E.D. N.C. 1953). A river can be navigable in its lower reaches and non-navigable upstream. *State of Alaska v. United States*, 662 F.Supp. 455 (D. Alaska 1987) *aff'd* 891 F.2d 1401 (9th Cir. 1989). For a discussion on the tests used to establish navigability, see WATERS AND WATER RIGHTS, *supra* note 12, chapter 32. This determination is distinctly different from the question of navigability for Commerce Clause purposes. U.S. Const., Art. I, sect. 8, cl. 3. Note, for example, the broad definition of "waters of the United States" in 33 C.F.R. § 328 (1993) (implementing the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988)) Compare these to the U.S. Army Corps of Engineers regulations for navigability, 33 C.F.R. § 329 (1993).

80. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842); *Ill. Cent. R.R. v. Ill.*, 146 U.S. 387, 452 (1892).

81. *People v. Monterey Fish Co.*, 195 Cal. 548 (1925). Fish includes shellfish. *McCready v. Va.*, 94 U.S. 391 (1876). Fish have been connected with the public trust since the doctrine's first use in this country. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Arnold v. Mundy*, 6 N.J.L. 1 (1821). Yet, until a few years ago, that connection was tangential. Fish were originally said to be owned by the several states in their sovereign capacities, rather than held by them as trustees. *State v. Stoutamire*, 131 Fla. 698 (1936); *State v. Gallop* 126 N.C. 979 (1900); *State v. Hume*, 52 Or. 1, 95 P. 808 (1908); *Dodgen v. Depuglio*, 146 Tex. 538, 209 S.W.2d 588 (1948). In *Douglas v. Seacoast Products*, 431 U.S. 265 (1976), however, the U.S. Supreme Court declared the ownership of fish and other wildlife a legal fiction. "Neither the states nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures [wild fish, birds, and other animals] until they are reduced to possession by skillful capture." 431 U.S. at 284. This movement in the law was not unforeseen. For many years courts had described the ownership of wild animals in terms of both ownership and a public trust. See, e.g., *Geer v. Conn.*, 161 U.S. 519 (1896) (sovereign ownership and public trust); *N.J. Dep't of Env'tl. Protection v. Jersey Cent. Power and Light*, 308 A.2d 671, 673 (N.J. 1973) ("[w]ild animals, including fish,

within the jurisdiction of the state, as far as they are capable of ownership, are included in the public trust."); State ex rel. Bacich v. Huse, 187 Wash. 75, (1936) (proprietary ownership and public trust). Seacoast Products ended the notion of ownership and left unimpaired the public trust aspect of this concept.

82. State v. Gallop 126 N.C. 979 (1900).

83. In re Steuart Transp. Co., 495 F.Supp. 38 (E.D. Va. 1980); N.J. Dep't of Env'tl. Protection v. Jersey Cent. Power and Light, 308 A.2d 671 (N.J. 1973).

84. Phillips Petroleum Co. v. Miss., 484 U.S. 469 (1988).

85. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 721 (Cal. 1983). See generally, WATERS AND WATER RIGHTS, *supra* note 12, at § 7.05(b).

86. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1986).

87. PUBLIC TRUST DOCTRINE, *supra* note 15, at chapter VII. Distinguishing a state's exercise of its police powers from the exercise of its public trust powers is not easy. Selvin characterizes their entanglement in this way: "the line between the state's police powers and its trusteeship responsibilities often becomes so muddled as to be virtually indiscernible." SELVIN, *supra*, note 14, at 121.

88. PUBLIC TRUST DOCTRINE, *supra* note 12; SELVIN, *supra* note 14, at 294. See *infra*, part II.E.1.

89. It is inconceivable that the [public] trust doctrine

should be viewed as a rigid prohibition, preventing all dispositions of trust property or utterly freezing as of a given moment the uses to which those properties have traditionally been put. It can hardly be the basis for any sensible legal doctrine that change itself is illegitimate.

Sax, *supra* note 20, at 186.

90. In this, the public trust doctrine is much like the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988). I discuss this further in part III.B.7, *infra*.

91. When originally used in America, the public trust doctrine was purely a common law doctrine. It could expand or contract according to judicial determinations of the public interest. It has since been codified to some degree in several states. PUBLIC TRUST DOCTRINE, *supra* note 12, at chapter VII. State agencies also have public trust responsibilities. *Id.*, at chapter VIII. See *infra* part II.E.2.

92. Ill. Cent. R.R. v. Ill., 146 U.S. 387 (1892); Orange v. Resnick, 94 A. 573 (Conn. 1920); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972); Tucci v. Salzhauer, 336 N.Y.S.2d 721 (1972) *aff'd* 307 N.E.2d 256 (1973); State v. Baum, 38 S.E. 900 (N.C. 1901).

93. N.C. Coastal Area Management Act, N.C. GEN. STAT. §§ 113A-100 to 113A-134.9 (1989); CAL. PUB. RES. CODE §§ 30000-30900 (1986 & 1994 Supp.). See also, CAL. CONST. art. X, § 4 (1976).



94. Swan Island Club Inc. v. White, 114 F. Supp. 95, 103 (E.D. N.C. 1953).
95. Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).
96. Cal. v. Superior Court, 625 P.2d 239 (1981).
97. People v. Mack, 97 Cal. Rptr. 448 (1971); Tucci v. Salzhauser, 336 N.Y.S.2d 721 (1972) *aff'd* 307 N.E.2d 256 (1973); Camaniti v. Boyle, 732 P.2d 989 (Wash. 1987).
98. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983).
99. Marine Resources Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (1988 & West Supp. 1994); Marine Mammal Protection Act, 16 U.S.C. §§ 1371-1407 (1988 & We Supp. 1994); Coastal Zone Management Act, 16 U.S.C. §§1451-1464 (1988 & West Supp. 1994); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & West Supp. 1994); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988); National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i (1988 & West Supp. 1993); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & West Supp. 1993); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988 & West Supp. 1993). State statutes include, e.g., The Porter-Cologne Water Quality Control Act, CAL. WATER CODE, §§ 13000-14050 (1992 & 1994 Supp.); California

Coastal Act, CAL. PUB. RES. CODE §§ 30000-30900 (1986 & 1994 Supp.); CAL. HEALTH & SAFETY CODE, Div. 20, Chap. 6.5, §§ 25100-25249.100 (1992 & 1994 Supp.) (hazardous waste management); North Carolina Coastal Area Management Act, N.C. GEN. STAT. §§ 113A-100 to 113A-134.9 (1989); and N.C. GEN. STAT. §§ 130A-290 to 130A-310.23 (1992 & 1994 Supp.) (hazardous waste management).

100. Marks v. Whitney, 491 P.2d 374, 380 (1971). This was dicta by the court, but an important indication of judicial attitude nonetheless.

101. E.g., Phillips Petroleum Co. v. Miss., 484 U.S. 469 (1988); Cal. v. Superior Court, 625 P.2d 239 (1981); City of Berkeley v. Superior Court, 491 P.2d 362 (Cal. 1980); Saxon v. Div. of State Lands, 570 P.2d 1197 (Or. 1979).

102. CAL. PUB. RES. CODE, §§ 30230 and 30525; N.C. CONST. art. XIV, § 5, N.C. GEN. STAT. §§ 113A-113, 113A-115 (1989).

103. I leave the precise issue of balancing these interests against the military's interests until later, but it is useful at this point in the paper to note that military uses of coastal lands conflict to varying degrees with all of these protected purposes. See *infra* part IV.

104. E.g., Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

105. As expressed by Chief Justice Taney,

The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They

both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856).

106. See *supra* pp. 1-2.

107. See *supra* parts II.C, II.E.1.

108. I have not found a case in which a court refused to review an alienation decision.

109. Likewise, I have not found a jurisdiction in which a legislature cannot do so.

110. 360 N.E.2d 773 (Ill. 1976).

111. 844 F.2d 1007 (3d Cir. 1988).

112. I discuss alienation of public trust lands to private parties for this reason: There are times when a court might treat the United States as a proprietor rather than a sovereign. See *infra* part IV.C.

113. People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (emphasis added).

114. Whether this reference to commerce was simply a decision to strictly follow the rationale of the Supreme Court in Illinois

Central R.R. v. Illinois, 146 U.S. 387 (1892), or whether it represents a failure on the part of the Illinois Legislature to keep pace with the evolution of the public trust doctrine is unclear. In any event, the court's concern was to protect the environment for future generations. "On this question of changing conditions and public needs, it is appropriate to observe that there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our natural environment." *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1976).

*See supra* part II.D.3.

115. *Scott*, 360 N.E.2d at 781 (emphasis added).

116. *Ill. Cent. R.R. v. Ill.*, 146 U.S. 387, 453 (1892).

117. *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 781 (Ill. 1976).

118. *West Indian Co.*, 844 F.2d at 1014.

119. *See supra* part II.C.

120. *West Indian Co. v. Gov't of the Virgin Islands*, 844 F.2d 1007, 1019 (3d Cir. 1988) (emphasis added). Note the court uses the word sovereign to refer only to the legislature, not the people. The court offers no explanation for this treatment of the people as subjects of the sovereign, rather than as the sovereign themselves. *See supra* notes 104-105 and accompanying

text. Perhaps this is simply a clue to the court's deferential attitude toward the legislature.

121. *Id.*, 844 F.2d at 1019 (emphasis added). As authority for this standard of review, the court cited a law review article and two treatises: "Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 MICH. L. REV. 471 (1970); W. Rodgers, ENVIRONMENTAL LAW § 2.16 (1977); 1 V. Yannecone & B. Cohen, *Environmental Rights and Remedies* § 2.3 (1972)." *Id.* It did not cite *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773 (Ill. 1976).

122. Note that the Third Circuit considered the matter in *West Indian Company* on appeal from a grant of a motion for summary judgment by the district court. Thus it viewed the facts in a light most favorable to the parties that sought to overturn the conveyance. 844 F.2d at 1015-16. Economic matters were at the heart of the court's decision. Transferring the land would enable the West Indian Company to expand the width of a public highway from two lanes to four, dredge the harbor to benefit navigation and thereby increase tourism, and create more jobs by developing the waterfront. 844 F.2d at 1019-20. Undoubtedly, the Third Circuit would have upheld the Illinois Legislature's action in *Scott* because that conveyance fostered commerce as well.

123. *Lake Mich. Fed'n v. U.S. Army Corps of Engineers*, 742 F. Supp. 441 (N.D. Ill. 1990).

124. Lake Mich. Fed'n, 742 F. Supp. at 443 (quoting Ill. Statutes, Public Act 85-1145, S.B. 1171).

125. See *infra* part IV.B.5.

126. See *infra* part IV.B.7.

127. See *infra* part IV.B.5.

128. Lake Mich. Fed'n v. U.S. Army Corps of Engineers, 742 F. Supp. 441, 442-43 (N.D. Ill. 1990). Here the court returned to the public access purpose of the public trust doctrine and stated,

Loyola ignores the fact that the public will have to sacrifice 18.5 acres of publicly held land in order to obtain a coastline to which it has unlimited access. Moreover, it glosses over the fact that the public is actually gaining nothing. The public currently has unrestricted access to the submerged lands which will become the new coastline. In reality, the public is losing its right of access to the portion of the lake which would become the interior portion of the lakefill. 742 F. Supp. at 446.

See part III.B, *infra*, for additional discussion of protection of public access under the public trust doctrine.

129. All eight subparagraphs come from Lake Mich. Fed'n v. U.S. Army Corps of Engineers, 742 F. Supp. 441, 445 (N.D. Ill. 1990).

130. Lake Mich. Fed'n, 742 F. Supp. at 446.

131. *Id.* The District Court permanently enjoined the conveyance and lakefill. On motion for reconsideration, the court refused to either discard the public trust doctrine as a "narrow ideology", or carve out an exception for non-profit entities. Reversal of law for policy reasons alone, the court noted, is a matter for state courts. 742 F. Supp. at 449.

132. No indication is made in the court's opinion as to whether Loyola University's attorneys argued that the actions by the Army Corps of Engineers preempted review under the public trust doctrine. Arguably, the Corps' duties to protect navigation under the Rivers and Harbors Act, 33 U.S.C. §§ 401-467n (1988), to protect the environment under the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (1988 & West Supp.), and to evaluate actions that have the potential to significantly affect the quality of the human environment (a very broad mandate, *see* 40 C.F.R. parts 1500-1508 (1993)) under the National Environmental Policy Act, 42 U.S.C. §§4321-4370a (1988), mirror the duties of the state legislature as trustee under the public trust doctrine. See part VI., *infra*, regarding the question of whether a federal public trust doctrine exists. Also see part IV., *infra*, on the ability of the state to challenge military activities under the public trust doctrine. Note also that the U.S. Supreme Court made nothing of the Army Corps of Engineers' role in Illinois Central's construction of piers in Lake

Michigan. Ill. Cent. R.R. v. Ill., 146 U.S. 387 (1892). See *supra* p. 9.

133. Justice Field's opinion in Illinois Central stresses the need to protect the public interest from the "mercy of a majority of the legislature." 146 U.S. at 455. Thus from a purely legal view, the Scott and Lake Michigan Federation courts apply the correct standard of judicial review. From a policy viewpoint, however, the answer may be different. See *infra* note 137.

134. This question takes on added importance if there is a federal public trust doctrine, because federal courts would be called upon to review congressional public trust decisions. See *infra* part VI.

135. Lake Mich. Fed'n v. U.S. Army Corps of Engineers, 742 F. Supp. 441, 445 (N.D. Ill. 1990); People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 781 (Ill. 1976).

136. For this premise the court cites People *ex rel.* Maloney v. Kirk, 45 N.E. 830 (Ill. 1896) (alienation of public trust lands upheld because the purpose was to extend Lake Shore Drive for the benefit of the public).

137. The activist role taken by judges like those in Scott and Lake Michigan Federation strengthens the public trust doctrine because one cannot determine the precise nature of the public interest in the trust lands until the judge rules. Such anxiety over the unknown will likely act to reduce alienation of public



trust lands; legislators will be hesitant to act, as will developers and creditors.

Some commentators refer to judicial scrutiny of legislative decisions in this area as "antidemocratic" or antimajoritarian." WATERS AND WATER RIGHTS, *supra* note 12, at 326-327; Huffman, *Trusting the Public Interest to Judges*, 63 DEN. U.L. REV. 565, 576 (1986). If Sax, *supra* note 15, is correct, however, and the role of the public trust doctrine is to slow down development until carefully considered, then perhaps an active judicial role is proper in public trust jurisprudence. Careful judicial review protects the disorganized majority from organized "narrow private interests." WATERS AND WATER RIGHTS, *supra* note 12, at 326.

Consider *West Indian Company*. In that case the West Indian legislature responded to public pressure to repeal its prior act. One can surmise that the initial grant of lands went through the legislature with little public attention paid to it. Only after the company began to dredge the harbor did the public make its feelings known.

Yet the environmental and conservation lobbies in Congress and the states are stronger today than ever before. So the fear that oil companies and real estate development companies will slide legislation past the public without notice is probably unfounded. Moreover, groups like the Sierra Club, the National Audubon Society, and the National Resources Defense Council are just as much special interest groups as real estate and petroleum industry lobbying organizations. My point is, when one speaks of

courts protecting the interests of the silent and disorganized majority of Americans in public trust cases, one is speaking nonsense.

138. See, e.g., the California and North Carolina constitutional and statutory provisions cited in part IV.B, *infra*.

139. U.S. CONST., art. VI, cl. 2.

140. See *infra* part III.D.

141. In some jurisdictions state agencies have the power to alienate public trust lands. See, e.g., *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Idaho 1983).

Yet such power is narrowly construed.

Despite generally liberal attitudes toward most exercises of agency power [under the public trust doctrine], courts have tended to take a narrow view of a legislature's delegation of authority in connection with the alienation of public trust lands, and such decisions made by non-elected agencies rather than the legislature itself will be subjected to closer scrutiny than will legislative decision making.

PUBLIC TRUST DOCTRINE, *supra* note 12, at 284.

142. Compare *People v. Calif. Fish Co.*, 138 P.2d 79 (Cal. 1913) (alienation) with *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (State Water Resources Control

Board has authority to balance public trust interests against Los Angeles' need for consumptive water).

143. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983); United Plainsmen Association v. North Dakota Water Conservation Commission, 247 N.W.2d 457 (N.D. 1976).

144. FLA. CONST. art. X, § 11; FLA. STAT. ANN. § 253.01 (West 1993).

145. *Id.* See also, PUBLIC TRUST DOCTRINE, *supra* note 12, at 240-44.

146. Adams v. North Carolina Department of Natural and Economic Resources, 249 S.E.2d 402 (N.C. 1978).

147. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978).

148. PUBLIC TRUST DOCTRINE, *supra* note 15, at 240.

149. N.J. Dep't of Env'tl. Protection v. Jersey Cent. Power and Light, 308 A.2d 671, 674 (N.J. 1973); WATERS AND WATER RIGHTS, *supra* note 17, 22.

150. PUBLIC TRUST DOCTRINE, *supra* note 12, at 326-32.

151. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983); Akau v. Olohana Corp., 652 P.2d 1130, 1134 (Haw. 1982); City of Wilmington v. Lord, 378 A.2d 635 (Del. 1977); State v. Deetz, 244 N.W.2d 407 (Wisc. 1974); Askew v. Hold the Bulkhead-Save Our Bays, 269 So. 2d 696, 697 (Fla. 1972) (public trust doctrine affords standing if plaintiff demonstrates

"special injury"); Paepcke v. Public Building Comms'n, 263 N.E.2d 11 (Ill. 1970).

152. Consider the confrontation between the National Audubon Society and Los Angeles County over the Mono Lake watershed. That suit began in 1979 and was still ongoing nine years later. Nat'l Audubon Soc'y v. Dep't of Water, 869 F.2d 1196 (9th Cir. 1988). California was a party and opposed Audubon's position.

153. 658 P.2d 709 (Cal. 1983).

154. Nat'l Audubon, 658 P.2d at 728.

155. A water pollution permit under the National Pollutant Discharge Elimination System has a term of no more than five years. 40 C.F.R. § 122.46, § 123.25(a)(17) (1993). A hazardous waste treatment, storage, and disposal permit under the Resource Conservation and Recovery Act (Part B permit) has a term of no more than ten years. 40 C.F.R. §§ 270.50, § 271.13 (1992).

156. U.S. CONST. art. VI, cl. 2.

157. U.S. CONST., art. IV, § 3.

158. 10 U.S.C. § 2663(c) (1988); Real Estate Handbook, 32 C.F.R. Part 644, Subpart C (1993).

159. 10 U.S.C. §§ 2663(c), 2672, 2672a (1988).

160. 10 U.S.C. § 2663(a), Condemnation, 32 C.F.R. § 644.111 to 644.121 (1993).

161. Shively v. Bowlby, 152 U.S. 1 (1893).

162. For a brief discussion of reserved versus non-reserved federal lands, see Federal Power Commission v. Oregon, 349 U.S. 435, 443-44 (1955).

163. Toomer v. Witsell, 334 U.S. 385 (1948); Wickard v. Filburn, 317 U.S. 111 (1942); Skiriotes v. Florida, 313 U.S. 69 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

164. Stockton v. Baltimore and N.Y. R.R., 32 F. 9, 17 (C.C. N.J. 1887).

165. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1865). See also, Gibbons v. Ogden, 22 U.S. (6 Wheat) 1, 197 (1824) ("The power of congress, then, comprehends navigation, within the limits of every state of the Union.").

166. United States v. Chicago, M., St. P., and P. R.R., 312 U.S. 52 (1941). Congress has delegated to the Secretary of the Army, as supervisor of the Army Corps of Engineers, broad powers to regulate the nation's navigable waters. "It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations

of the United States in channel improvement, covering all matters not specifically delegated to some other executive department."

33 U.S.C. § 1 (1988).

167. Stockton v. Baltimore and N.Y. R.R., 32 F. 9 (C.C. N.J. 1887).

168. Lewis Blue Point Oyster Cultivation Co. v. Griggs, 229 U.S. 82 (1913); United States v. Chandler-Dunbar, 229 U.S. 53 (1913); Stockton v. Baltimore and N.Y. R.R., 32 F. 9 (C.C. N.J. 1887).

Because all lands beneath navigable waters in the United States are burdened by the servitude, exercise of the servitude does not result in a transfer of title. James v. Dravo Contracting Company, 302 U.S. 134 (1937). *See also*, 32 C.F.R. § 644.2(d) (1993).

169. James v. Dravo Contracting Co, 320 U.S. 134 (1937).

170. Stockton v. Baltimore and N.Y. R.R., 32 F. 9 (C.C. N.J. 1887).

171. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970). Army Corps of Engineer regulations require the Corps to conduct a public interest review before it issues a permit under the Rivers and Harbors Act. 33 C.F.R. § 320.4 (1993). Curiously absent from the factors it must directly consider in that review is national defense.

172. United States v. Kane, 602 F.2d 491 (2d Cir. 1979).

173. United States v. Chicago, M., St. P., and P. R.R., 312 U.S. 52 (1941).
174. United States v. Rands, 389 U.S. 121 (1967).
175. United States v. 50' Right of Way or Servitude in, on, over, and Across Certain Lands Situated in Bayonne, Hudson County, N.J., 337 F.2d 956 (3d Cir. 1964).
176. Light v. United States, 220 U.S. 523 (1911).
177. Kleppe v. New Mexico, 426 U.S. 529 (1976); United States v. San Francisco, 310 U.S. 16 (1939); Light v. United States, 220 U.S. 523 (1911).
178. Kleppe v. N.M., 426 U.S. 529 (1976).
179. United States v. San Francisco, 310 U.S. 16 (1939).
180. United States v. Trinidad Coal Co., 137 U.S. 160 (1890).
181. The Supreme Court opted not to comment on this issue in Kleppe v. N.M., 426 U.S. 529, 546 (1976).
182. 5 U.S.C. §§ 551(13), 553(a)(2), and 701(b)(2) (1988) (read these sections together to understand the exception). See Ono v. Harper, 592 F.Supp. 698 (D. HI. 1983). Contrast federal taking of private property which is reviewable under the Administrative Procedures Act. 5 U.S.C. §§ 551(10), 551(13), 701(b)(2) (1988). See Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981) *reversed on other grounds, sub nom.*, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

183. *Compare Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) with *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).
184. *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572, 580 (1987).
185. U.S. CONST. art. I, § 8, cls. 12-14, 16, and 17.
186. *Youngstown Sheet and Tube Co. v Sawyer*, 343 U.S. 579 *passim* (1952) (plurality opinion) (Frankfurter, J., concurring); BAILEY, *supra* note 2, at 39, 41, and 111-113 (Navy tried to get Congress to assert its war powers authority over submerged lands, but was unsuccessful).
187. *Ashwander v. TVA*, 297 U.S. 288 (1936) (plurality opinion) (construction of a dam and powerplant for munitions production a valid exercise of both Congress' war powers and Commerce Clause power); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915) (Congress' ability to regulate navigation includes ability to provide mooring facilities for U.S. Navy vessels); *Bailey v. United States*, 62 Cl. Ct. 77 (1926) (Congress' power over navigation allows it to take lands for naval purposes). *Contra United States v. 50' Right of Way or Servitude in, on, over, and Across Certain Lands Situated in Bayonne, Hudson County, N.J.*, 337 F.2d 956 (3d Cir. 1964); *United States v. 412.715 Acres of Land, Contra Costa County, Cal.*, 53 F. Supp. 143 (N.D. Cal. 1943).



188. "[T]he likelihood of [Congress using its war powers to regulate navigable waters] in an era of expanded Commerce Clause authority...is questionable. WATERS AND WATER RIGHTS, *supra* note 17, at § 35.05.

189. 3 U.S.C. § 3 (1988). The statute reads in part, "In the interest of the national defense, *and for the better protection of life and property on the navigable waters of the United States....*" (emphasis added).

190. "The Congress shall have Power...To raise and support Armies...." U.S. CONST. art. I, § 8, cl. 12. "The Congress shall have the Power...To provide and maintain a Navy[.]" U.S. CONST. art. I, § 8, cl. 13. "The Congress shall have the Power...To make Rules for the Government and Regulation of the land and naval Forces[.]" U.S. CONST. art. I, § 8, cl. 14.

191. See *United States v. Curtis-Wright*, 299 U.S. 304 (1936).

192. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 590-92 (1973).

193. *State ex rel California Coastal Commission v. United States*, 457 U.S. 273, 280 (1982), and *Little Lake Misere*, 412 U.S. at 592-94.

194. *California ex rel State Lands Commission*, 457 U.S. 273; *United States v. 11.037 Acres of Land*, 685 F. Supp. 214, 216 (N.D. Cal. 1988); *State of California v. United States*, 512 F. Supp. 36, 38 (1981). *Contra United States v. 1.58 Acres of Land*,

523 F. Supp. 120 (D. Mass. 1981). I discuss *United States v. 1.58 Acres* in detail in part VI, *infra*.

195. *State of California v. United States*, 512 F. Supp. 36, 44-45 (1981); *City of Alameda v. Todd Shipyards Inc.*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986) (Todd II); *City of Alameda v. Todd Shipyards Inc.*, 632 F. Supp. 333, 337 (N.D. Cal. 1986).

196. Todd II, 635 F. Supp. at 1450.

197. *Real Estate Handbook*, 32 C.F.R. part 644 (1993).

198. 43 U.S.C. §§ 1301-1314 (1988).

199. 16 U.S.C. §§ 1451-1464 (1988 & West Supp. 1994).

200. H. REP. NO. 1778, 80th Cong., 2d Sess., (no page numbers provided) (1950), *reprinted in* 1953 U.S.C.A.A.N. 1417 [hereinafter H. REP. NO. 1778]. *See generally*, BAILEY, *supra* note 2, at chapter 8.

201. Some members of the Senate supported Secretary Ickes' policy reversal. In a report to the President in 1939, the Senate Natural Resources Committee indicated its desire to assert federal control over oil deposits in the marginal sea.

Another problem affecting petroleum reserves which merits attention here is that of national policy toward ownership of petroleum and natural gas lying beneath submerged areas off the coast of the United States between low-water mark and the 3-mile limit. Unsettled questions of law are involved, but the very existence

of doubt offers an opportunity for the bold assertion of the national interest in any petroleum or natural-gas reserves that may be found beneath those areas. It is one of the unfortunate errors of our national development that early in our history the public ownership of all subsurface mineral wealth was not declared; such a step would have been so simple at an early stage and would have meant so much in terms of [petroleum] conservation, and it would be so complex and costly at this stage -- not to speak of the wastes of irreplaceable resources that have already taken place. But here and now in 1939 we have one last opportunity to take steps which will reserve to the nation petroleum deposits that may be of considerable extent.

*Hearings on S.J. Res. 83 and 92 Before the Senate Natural Resources Comm., 76th Cong., 1st Sess., 21 (1939) as quoted by BAILEY, supra note 2, at 104.*

202. Mr. Ickes position was, "Title to the soil under the ocean to the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State." H. REP. NO. 1778 at 1417.

203. S.J. Res. 208, 75th Cong., 3d Sess. (1938). See also BAILEY, *supra* note 2, at 101-104.

204. United States v. Cal., 332 U.S. 19, 23 (1947). See generally BAILEY, *supra* note 2.

205. 92 CONG. REC. 10,803 (1946) and 93 CONG. REC. 6253 (daily ed. May 29, 1952).

206. United States v. Cal., 332 U.S. 19 (1947).

207. U.S. CONST., art. III, § 2. Both parties agreed to try the case based upon legal argument alone; the Court heard no evidence. United States v. Cal., 332 U.S. at 24.

208. California's original answer totalled 822 pages. SHERIDAN DOWNEY, THE TRUTH ABOUT THE TIDELANDS 29 (1948). Among the arguments California advanced, was that it held the lands in fee simple because of a "long-existing Congressional policy of acquiescence in California's...ownership" and that the U.S. Attorney General lacked power to file suit because Congress did not specifically authorize him to do so. United States v. Cal., 332 U.S. at 24, 27.

209. The marginal sea extends from the low water mark to seaward to three miles. Thomas Jefferson helped fix the limit at three miles because that was the range of cannon shot in his day. *Id.* at 33. President Reagan extended the limit to twelve miles in 1988, Proclamation No. 5928, 54 Fed. Reg. 777 (1988), but Congress made no corresponding change to the Submerged Lands Act. See 43 U.S.C. §§ 1301(b), 1312 (1988 & West Supp. 1994).

210. United States v. La., 339 U.S. 699 (1950); United States v. Tex., 339 U.S. 707 (1950).

211. Forty-six of forty-eight states supported quitclaim legislation, a fact which Bailey terms "little short of phenomenal." BAILEY, *supra* note 2, at 148. Additionally, forty-three states filed amicus briefs with the Supreme Court in favor of a rehearing of United States v. California. *Id.*, at 186. Unanimity was never reached in Congress, however, where one of the quitclaim bills President Truman vetoed passed the Senate by just ten votes. *Id.*, at 156 (citing 92 CONG. REC. 9642 (1951)).

212. BAILEY, *supra* note 2, at 212 (citing N.Y. Times, Jan. 17, 1951).

213. United States v. California, 332 U.S. 19, 29 (1947) (emphasis added).

214. *Id.*, at 34-36.

215. DOWNEY, *supra* note 208, at 56-57.

216. BAILEY, *supra* note 2, at 149-50. At the very least, the Supreme Court's pronouncement served to cloud the titles of submerged lands in the marginal sea. Some feared this would lead to problems securing investors for offshore oil development. *Id.*

217. The House Committee on the Judiciary said, "We have heard it described in such terms as 'novel,' 'strange,' 'extraordinary and unusual,' 'creating an estate never before heard of,' 'a reversal of what all competent people believe the law to be.'

`creating a new property interest,' `a threat to our constitutional system of dual sovereignty,' `a step toward the nationalization of our natural resources,' `causing pandemonium,' etc." H. REP. NO. 1778, *supra* note 205, at 1419.

218. *United States v. California*, 381 U.S. 139, 186 (1965) (Black, J., dissenting). President Truman had tried to reassure Texans that the federal government was not out to steal its oil revenues at a meeting in 1950. BAILEY, *supra* note 2, at 195. Nevertheless, his steadfast refusal to sign quitclaim legislation undoubtedly cost him the support of some members of Congress. *Id.* at 215

219. 43 U.S.C. §§ 1301-1315 (1988 & West Supp. 1994).

220. The Supreme Court has been careful to preserve the rationale of its *United v. California*, 332 U.S. 19 (1947), holding, by distinguishing between the results of its decision and the means used to arrive at it.

We held [in the *California*, *Louisiana*, and *Texas* cases] that the United States, not the States, had paramount rights in and power over such lands and their products, including oil. Congress accepted our holdings as declaring the then-existing law -- that these States had never owned the offshore lands -- but believed that all coastal States were equitably entitled to keep the submerged lands they had long treated as their own, without regard to technical legal ownership or

boundaries. Accordingly, Congress exercised its [paramount] power by passing the Submerged Lands Act. United States v. La., 363 U.S. 1, 86 (1960) (Black, J., dissenting and concurring).

221. Principle among them was Professor William L. Bishop, Jr., of the University of Michigan Law School. H. REP. NO. 1778, *supra* note 200, as reprinted in 1953 U.S.C.C.A.N. 1473 (minority report).

222. See *supra* part II.A.

223. His use was imperfect because the theory ultimately must lead to the public trust doctrine if it is to have any usefulness. To say that no one owns submerged lands beneath the world's oceans is to say that whoever has the superior power is able to use these lands. In terms of the three-mile belt surrounding the marginal sea, that power clearly rests with the United States government. But Justice Black was not concerned with use alone. He was also concerned with wise use of the resources in those lands. This was the very premise behind the United States action against California -- oil companies as regulated by California were unwisely managing coastal oil deposits. United States v. Cal., 332 U.S. 19 (1947); H. REP. NO. 1778, *supra* note 200, reprinted in 1953 U.S.C.C.A.N. 1440 (minority view); BAILEY, *supra* note 2, at chapters 7 and 8. Control of coastal resources and the duty to use them wisely are the very heart of the public trust doctrine, yet Justice Black makes only an offhand reference

to it ("The [federal] Government which holds it interests here as elsewhere in trust for all the people shall not be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property...." 332 U.S. 19, at 40). Had Justice Black utilized the public trust doctrine as the basis for his decision the states would not have been any less emotional in their responses, but attorneys would not have been left scrambling to determine the nature and limits of Black's non-ownership theory.

Justice Black's use of the non-ownership theory was also unclear. In his opinion he seems to indicate U.S. control of submerged lands rests first on ownership and then on the use of its paramount powers. The question before the Court, as he framed it, was "not *merely* who owns the bare title to the lands under the marginal sea" it was whether the United States had the greater political interest in those lands. 332 U.S. 19, at 29 (emphasis added). He answered the question thus: "Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty." 332 U.S. 19, at 34. Left alone, these words indicate the United States owns and has sovereign control, vice merely a proprietary interest in, submerged lands. Yet in the decree ordering California to quit the lands, the Court refused to include language suggested by the Solicitor General denoting ownership of



the lands rested in the United States. *United States v. Texas*, 339 U.S. 707, 724 (Frankfurter, J., dissenting).

The confusion is now obvious. In its argument before the Court in both *United States v. Louisiana*, 339 U.S. 699 (1950) and *United States v. Texas*, 339 U.S. 707 (1950), the United States claimed it either owned the lands in fee simple "or [was] possessed of paramount rights in, and full dominion and power over [the lands]." 339 U.S. at 701 and 709. Justice Douglas, in his opinion in the Texas case, found Texas owned the submerged lands off its coast when it was a republic, but relinquished its ownership upon its admission into the Union; a finding inconsistent with the non-ownership theory. 339 U.S. 707, 717. Justice Douglas then found the United States had control over the lands but stopped short of saying it owned them. Once again, both decrees issued by the Court in the Texas and Louisiana cases omitted the ownership language requested by the United States. 340 U.S. 899 and 900 (1950).

Courts still struggle with the notion of non-ownership. Contrast the opinions of Justice Reed and Justice Black in *Alabama v. Texas*, 347 U.S. 272 (1954) (per curiam) (non-ownership) with the majority opinion in *United States v. California*, 381 U.S. 139, 167 (1965) (Court referred to submerged lands seaward of the three-mile limit as "property rights belonging to the United States").

224. See *supra* note 223.

225. See *supra* note 223. See also part VI, *infra*, regarding a federal public trust doctrine.

226. *United States v. Cal.*, 447 U.S. 1, 3 (1980) (United States owns all submerged lands seaward of three mile limit); *United States v. Cal.*, 381 U.S. 139, 167 (1965) (refers to United States as having "property rights" in submerged lands); *Ala. v. Tex.*, 347 U.S. 272 (per curium) (refers to submerged lands as "belonging to the United States."); *United States v. Tex.*, 339 U.S. 707, 717 (1950) (Texas used to "own" submerged lands in the Gulf of Mexico).

227. 43 U.S.C § 1311(a)(1) (1988).

228. The Supreme Court glossed over this question in its 26-line per curium opinion sustaining the constitutionality of the Submerged Lands Act in *Alabama v. Texas*, 347 U.S. 272 (1954). Both Justice Black and Justice Douglas, authors of the *California*, *Louisiana*, and *Texas* decisions, dissented over the cavalier treatment of the issue by the majority, yet the issue has not arisen since.

229. See *infra* part III.B.9, where I discuss inverse condemnation further.

230. *Shively v. Bowlby*, 152 U.S. 1 (1893); *Ill. Cent. R.R. v. Ill.*, 146 U.S. 387 (1892); *Pollard's Lessee v. Hagan*, 4 (3 How.) 212 (1845); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

231. 43 U.S.C. § 1311(a)(1) (1988). The Act lumps these lands

together under the definition of "lands beneath navigable waters." 43 U.S.C. § 1301(a) (1988).

232. The seaward limit of Florida's and Texas' control extends three marine leagues into the Gulf of Mexico. *United States v. La.*, 363 U.S. 1 (1960); *United States v. Fla.*, 363 U.S. 121 (1960). The Act does not foreclose assertions by states that their seaward boundaries extend farther than three miles, but it fixes those assertions in time. 43 U.S.C. § 1312 (1988). See also, *United v. Alaska*, \_\_ U.S. \_\_, 112 S.Ct. 1602 (1992) (United States could force Alaska to waive any claims it may have had under the Submerged Lands Act before it granted the City of Nome a Rivers and Harbors Act permit to extend its coastline seaward).

233. Curiously, both the Act and its legislative history, H. REP. NO. 215, 83d Cong., 1st Sess., (1953) (with appendices), reprinted in 1953 U.S.C.C.A.N 1385-1640, are devoid of more than casual references to the public trust doctrine. Yet the language of the Act clearly preserves the public trust rights of states out to the three mile limit. Section 1311(a) states

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) *the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance*

*applicable State law* be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.

(Emphasis added). Whether or not Congress had the public trust doctrine in mind when it passed that language into law, the breadth of that declaration is sufficient to encompass all aspects of the public trust doctrine.

234. See *supra* note 233.

235. 43 U.S.C. § 1314 (emphasis added).

236. H. REP. NO. 695, 82d Cong., 1st Sess., (1951), *reprinted in* 1953 U.S.C.A.A.N. 1398 [hereinafter H. REP. NO. 695].

237. 43 U.S.C. § 1314(b) (1988).

238. 43 U.S.C. § 1301(e) (1988).

239. U.S. CONST. art. I, § 8, cl. 3.

240. See *supra* notes 215-217 and accompanying text.

241. *Ala. v. Tex.*, 374 U.S. 272, 282 (1954) (per curiam) (Douglas, J., dissenting).

242. 374 U.S. 272 (1954).

243. "This Court's holding [in *United States v. California*, 332 U.S. 19 (1947),] precipitated one of the most hotly contested political issues of the post-war decade." *United States v. Cal.*, 381 U.S. 139, 185 (1965) (Black, J., dissenting).

244. The United States' navigational powers are further delineated in 34 U.S.C. § 1311(d) (1988).
245. 43 U.S.C. § 1314(a) (1988).
246. Pollard's Lessee v. Hagan, 4 (3 How.) 212, 280 (1845).
247. WATERS AND WATER RIGHTS, *supra* note 12, at chapter 35.
248. United States v. La., 363 U.S. 1, 84 (1960).
249. Moore v. Hampton Roads Sanitation Distr. Comm'n, 57 F.2d 1030 (4th Cir. 1977).
250. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).
251. United States v. Kane, 602 F.2d 491 (2d Cir. 1979).
252. Cal. ex rel State Lands Comm'n v. United States, 457 U.S. 273, 280 (1982). *See also* Cal. ex rel State Lands Comm'n v. United States, 805 F.2d 857 (9th Cir. 1986) (unrelated case).
253. 43 U.S.C. § 1314(a) (1988).
254. 43 U.S.C. §§ 1331-1356 (1988).
255. 43 U.S.C. § 1341(d) (1988). The Secretary of Defense must first obtain the President's approval.
256. 10 U.S.C. § 113 (1988).
257. United States v. La., 363 U.S. 1, 86 (1960) (Black, J., concurring and dissenting).
258. 43 U.S.C. § 1341(d) (1988).

259. See *infra* part III.A.

260. 16 U.S.C. §§ 1451-1464 (1988 & West Supp. 1994).

261. This does not mean the act has not generated conflict. President Reagan, for example, refused to fund the Coastal Zone Management Act by making no provision for it in any one of his eight federal budgets. Congress funded the act nonetheless. 136 CONG. REC. H8070 (daily ed. Sept. 26, 1990).

262. H. REP. NO. 1012, 96th Cong., 2d Sess. 22-23 (1980), *reprinted in* 1980 U.S.C.A.A.N. 4370-71 [hereinafter H. REP. NO. 1012].

263. A report by the Marine Science, Engineering, and Resources Commission. This is commonly referred to as the "Stratton Report." S. REP. NO. 277, *reprinted in* 1976 U.S.C.C.A.N. 1772.

264. S. REP. NO. 277, *supra* note 269, at 5, *reprinted in* 1976 U.S.C.A.A.N. 1768, 1772-73.

265. 136 CONG. REC. H8069 (1990).

266. 16 U.S.C. § 1451(a) (1988 & West Supp. 1994).

267. 16 U.S.C. § 1452(1) (1988 & West Supp. 1994).

268. S. REP. NO. 753, 92d Cong., 2d Sess., (pages not separately numbered) (1972), *reprinted in* 1972 U.S.C.C.A.N. 4778 [hereinafter S. REP. NO. 753]; H. REP. NO. 1012, *supra* note 262, at 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4381 ("It is this rational balancing of competing pressures on finite coastal

resources which was intended by the 1972 act."). Part of the difficulty in balancing competing uses under the Act is the Act's lack of emphasis. It does not clearly afford one coastal use more weight than another. The Act's national defense language highlights this dilemma. Congress first finds, "New and expanding demands for food, energy, minerals, [and] defense needs...are creating stress on coastal areas." 16 U.S.C. § 1451(f) (1988 & West Supp. 1994). Then, instead of instituting a means to reduce that demand, Congress declares that state coastal management programs "should at least provide for...priority consideration...for siting major facilities related to national defense." 16 U.S.C. § 1452(2)(D) (1988 & West Supp. 1994). From this, I can only conclude that the concept behind the Act is to draw competing interests together and allow them to mediate their differences in an organized manner.

269. 16 U.S.C. § 1452 (19\_\_).

270. In context, the quote reads,

In view of the continued growth in coastal population and the accompanying environmental problems, [the Act as amended]...provide[s] a greater emphasis on environmental protection values in the administration of the [Coastal Zone Management Act.] This is not to say that [House] Committee [on Merchant Marine and Fisheries] has abandoned the fundamental balancing character of the...[Act]. The statute continues to

recognize the need for economic growth. However, [the Act as amended]...shifts the balance to emphasize more strongly a priority for maintaining the function of natural systems in the coastal zone.

136 CONG. REC. H8070 (daily ed. Sept. 26, 1990). Among the changes Congress made to the act in 1990 is a requirement for states to develop and implement a "Coastal Nonpoint Pollution Control Program." 16 U.S.C. § 1455b (1988 & West Supp.). This program is aimed at reducing pollution caused by certain lands uses, such as pesticide and fertilizer pollution from golf courses, rather than point sources like sewer pipes.

271. S. REP. NO. 753, *supra* note 268, *reprinted in* 1972 U.S.C.C.A.N. 4784. *See also* Coastal Management Program Development Regulations 15 C.F.R. § 923.2(b) (1993).

272. Program requirements are found at 16 U.S.C. § 1455(d) (1988 & West Supp. 1994) and 15 C.F.R. § 923.80 (1993). Congress amended the program requirements in 1990. Among the changes was the addition of public participation requirements for consistency determinations. 16 U.S.C. § 1455(d)(14) (1988 & West Supp. 1994).

273. *Am. Petroleum Inst. v. Knecht*, 609 F. 2d 1306, 1312 (9th Cir. 1979).

274. *Id.* at 1314 n.15.

275. This term is defined at 16 U.S.C. § 1453(1) (1988).



276. *Id.*

277. *Id.*

278. 16 U.S.C. 1456(c)(1)(A) (1988 & West Supp. 1994).

279. 15 C.F.R. § 930.32 (1993). It is not sufficient to find federal management policy is similar to a state's policy. It is also insufficient to rely on future consistency determinations triggered by further developments in the same federal project. *Conservation Law Foundation v. Watt*, 560 F.Supp. 561 (D. Mass. 1983).

280. 15 C.F.R. Part 930, subpart G (1993). *See, Barcelo v. Brown*, 478 F. Supp. 646, 681-82 (D. P.R. 1979) *aff'd in part, vacated in part on other grounds*, 643 F.2d 35 (1st Cir. 1981), *rev'd on other grounds sub nom.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (Act's mediation provisions do not rob court of jurisdiction).

281. 15 C.F.R. § 930.116 (1993). States have standing to challenge federal consistency determinations. *Secretary of Interior v. California*, 464 U.S. 312, 319 n.3 (1984). The limited waiver of the federal government's sovereign immunity found in the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1988), provides the means to obtain relief. *State of New York v. DeLyser*, 759 F. Supp. 982 (W.D. N.Y. 1991).

282. "The federal consistency provisions are at the heart of the Nation's coastal zone management program and it has become

increasingly clear that the combination of Supreme Court dicta and federal agency belligerence are a troublesome combination." 136 CONG. REC. H8073 (daily ed. Sept. 26, 1990). The case to which this statement refers is *Secretary of the Interior v. Cal.*, 464 U.S. 312 (1984) (5-4 decision).

283. 136 CONG. REC. H8072 (daily ed. Sept. 26, 1990); H. REP. NO. 1012, *supra* note 262, at 35, *reprinted in* 1980 U.S.C.C.A.N. 4383.

284. Pub.L. 92-583, Title III, § 307(c), 86 Stat. 1285 (1972).

285. Pub.L. 101-508, Title VI, § 6208(a), 104 Stat. 1388-307 (1990).

286. *Secretary of Interior v. Cal.*, 464 U.S. 312 (1984).

287. 136 CONG. REC. H8076 (1990).

288. Congress was resolute in its decision to amend the Act in 1990. The bill passed in the House 391 to 32 with 9 members abstaining or absent. 136 CONG. REC. H8103 (daily ed. Sept. 26, 1990).

289. 16 U.S.C. § 1456(c)(1)(B) (19\_\_).

290. To obtain a waiver under the exemption provision, 16 U.S.C. § 1456(c)(1)(B), a federal agency has to:

(1) Obtain a judicial decree that the federal activity is inconsistent with the state coastal management program;

(2) Obtain a determination from the Secretary of Commerce that formal mediation will not resolve the inconsistency;

(3) Convince the Secretary of Commerce to write a letter to the president asking for a waiver; and

(4) Convince the president that the waiver is in the paramount interests of the United States.

291. *Id.*

292. Congress requires the Secretary of Commerce to biennially report all "federal activities and projects which...are not consistent with an applicable approved state management program." 16 U.S.C. § 1462(a) (1988 & West Supp. 1994). As a secretarial finding of inconsistency is a prerequisite to a presidential exemption, Department of Defense officials will probably be reluctant to apply for exemptions. Congress will take note of each one.

293. *E.g.*, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & West 1994), the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & West 1994), and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988). Plaintiffs often challenge federal actions in the coastal zone under these and other statutes, including the Coastal Zone Management Act. *See, e.g.*, *Conservation Law Foundation v. Watt*, 560 F.Supp. 561 (D. Mass. 1983); *Romero-Barcelo v. Brown*, 643 F.2d 835 (1st Cir. 1981) *reversed on other grounds, sub nom.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

294. 136 CONG. REC. H8077 (1990).

295. S. REP. NO. 753, *supra* note 274, reprinted in 1972 U.S.C.A.A.N. 4776.

296. 16 U.S.C. § 1455(d)(2)(D) (1988 & West 1994).

297. The authors of PUBLIC TRUST DOCTRINE, *supra* note 15, at chapter VII, recommend states do this as the best way to ensure federal activities do not run afoul of their public trust laws.

298. The Coastal Zone Management Act does not preempt state law regarding environmental permits. Cal. Coastal Comm'n v. Granite Rock, 480 U.S. 572 (1987). The Ninth Circuit Court of Appeals required the Navy to obtain a permit from the State of Washington under its coastal management statute in Friends of the Earth v. United States Navy, 841 U.S. 927 (9th Cir. 1988). Absent from both cases is a discussion of sovereign immunity. Granite Rock dealt with a private corporation seeking a license to mine in a National Forest so sovereign immunity was not an issue. In Friends of the Earth, the court found an express congressional mandate in the National Defense Authorization Act for the Navy to obtain state permits prior to obligating funds for construction of a homeport facility.

As an alternative basis for its holding, the Ninth Circuit found the Navy needed a permit under Washington's coastal management statute. It used the Granite Rock rationale that a state permit that seeks only to ensure protection of the environment and does not attempt to determine appropriate uses of federal lands is not preempted by the Coastal Zone Management

Act. This is an unsound extension of the Granite Rock holding. The appropriate issue in any case where a state or local government attempts to require a federal agency to obtain a permit is whether Congress has waived the United States' sovereign immunity. *Hancock v. Train*, 426 U.S. 167 (1976). Absent a clear expression of Congress' intent to waive sovereign immunity, no inferior government can place requirements on the federal government. *Id.* Since the Coastal Zone Management Act does not contain a waiver of sovereign immunity, a permit requirement under state law should not apply to federal agencies.

The issue is different when the state leases or licenses its land to the federal government. In that case, the state may place the very same provisions it would have placed in a permit in the lease or license agreement. See PUBLIC TRUST DOCTRINE, *supra* note 12, at 241-44.

299. Thus, when incorporated into a state's coastal management program under the Coastal Zone Management Act, the public trust doctrine provides flexibility even in a statutory system. Of course flexibility can mean unpredictability; a reason why the public trust doctrine can be problematic for the military.

300. In *Toomer v. Witsell*, 334 U.S. 385 (1948) the Court invalidated a South Carolina statute that taxed non-resident shrimp fishermen at a higher rate than residents. Its decision rested upon the Privileges and Immunities Clause. U.S. CONST. art. IV, § 2. The Court distinguished, but did not overrule,

McCready v. Virginia, 94 U.S. 391 (1876), because it held that states could prohibit non-residents from planting oysters in the Ware River for later harvest based on state ownership of the river bed. As United States v. California, 332 U.S. 19 (1947) declared no one owned the marginal sea, and Toomer dealt with shrimp fishing in those waters, the Court reasoned McCready no longer applied. Of course the Submerged Lands Act vested the states with ownership of the resources in the marginal sea. Accordingly, the majority opinion in Toomer is now obsolete.

Justice Frankfurter's concurring opinion in Toomer is better reasoned. He would have invalidated South Carolina's statute based on the negative Commerce Clause doctrine. He believed the Privileges and Immunities Clause has to be read in light of existing law at the time the Framers drafted the Constitution. As the public trust doctrine was "one of the weightiest doctrines in our law" in 1787, there was no justification for the opinion that the Privileges and Immunities Clause was designed to thwart state preservation of its resources for its citizens. 334 U.S. at 408. See also, Smith v. Maryland, 59 U.S. (18 How.) 71 (1855). Congress recognized state control over the taking of natural resources in the Submerged Lands Act. See 43 U.S.C. § 1311(a) (1988) and S. REP. NO. 133, 83d Cong., 1st Sess., (1953), reprinted in 1953 U.S.C.C.A.N. 1479 [hereinafter S. REP. NO. 133].

301. See generally, PUBLIC TRUST DOCTRINE, *supra* note 12, chapter VI.

302. Weber v. Bd. of Comm'rs, 85 U.S. (18 Wall.) 57 (1873). North Carolina amended its laws in 1985 to preclude an adverse possession defense for actions involving public trust lands. Daniel F. McLawhorn, *The Public Trust in Submerged Lands*, POPULAR GOVERNMENT, Spring 1986 at 9.

303. See *supra* section II.F.

304. The Coastal Zone Management Act "is neither a jurisdictional grant nor a basis for stating a claim upon which relief can be granted." Town of Hempstead v. Village of North Hills, 482 F. Supp. 900, 905 (E.D. N.Y. 1979). In Friends of the Earth v. Navy, 841 F.2d 927 (9th Cir. 1988), the court found the plaintiffs had standing under the Administrative Procedures Act to challenge the Navy's compliance with the 1987 National Defense Authorization Act. The court did not conduct a detailed analysis of the standing issue regarding the Coastal Zone Management Act.

305. 136 CONG. REC. H8071-72 (1990); S. REP. NO. 753, *supra* note 274, reprinted in 1972 U.S.C.A.A.N. 4787.

306. 16 U.S.C. §§ 1455a(b)(3) and 1456b(a)(3) (1988); 136 CONG. REC. H8071-72 (daily ed. Sept. 26, 1990).

307. See *supra* part II.D.1.

308. The power of the public trust doctrine to prevent successful claims of regulatory takings of private property is a

recurrent theme in virtually all public trust literature. See, e.g., PUBLIC TRUST DOCTRINE, *supra* note 15. But the doctrine is not a guarantee of success. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1986) (State cannot hinge a building permit upon a condition that the applicant grant an easement across a dry sand beach (non-public trust property) to facilitate public access to the shore).

309. Compatibility of military training with preservation and enjoyment of natural resources remains an unsettled issue. Aircraft noise is a significant factor. See, e.g., 16 U.S.C.A. § 1, note (Department of Interior required to study effect of aircraft overflights in the Grand Canyon), S. 21, 103d Cong., 1st Sess., Title VIII (Desert Protection Act) (Military overflights compatible with designation of lands as wilderness areas), and *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981) (Marine aircraft conducting simulated aircraft carrier landings in the sky above plaintiff's property resulted in an unconstitutional taking of property).

310. Gone are the days, if they ever existed, when military leaders could rely on their federal status and ignore the states. Military leaders now identify and track state concerns; a military-state dispute over coastal resources is unlikely to reach the proportions where a state resorts to the action I suggest here. If truly at loggerheads with the military, state officials would probably seek congressional assistance. Indeed,



history demonstrates the way in which disputes over public trust resources move amoeba-like among the three branches of government. See, e.g., *United States v. Cal.*, 332 U.S. 19 (1947); *Ill. Cent. R.R. v. Ill.*, 146 U.S. 387 (1892); *West Indian Co. v. Gov't of the Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988); BAILEY, *supra* note 2.

311. These types of activities were the bases of the plaintiffs' challenge in *Barcelo v. Brown*, 478 F. Supp. 646 (D. P.R. 1979) *aff'd in part, vacated in part on other grounds*, 643 F.2d 35 (1st Cir. 1981), *rev'd on other grounds sub nom.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

312. U.S. CONST. art. VI, cl. 2. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

313. In the Commerce Clause context, Chief Justice Marshall made this clear in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) where he wrote,

[s]hould this collision [between state and federal law] exist, it will be immaterial, whether those [state] laws were passed in virtue of a concurrent power 'to regulate commerce among foreign nations and the several states,' or, in virtue of a domestic power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress.

22 U.S. at 10.

314. This analysis comes from *English v. General Electric Company*, 496 U.S. 72 (1990) unless otherwise noted.

315. *Id.* at 78.

316. *Beveridge v. Lewis*, 939 F.2d 859, 862, note 1 (9th Cir. 1991).

317. To the contrary, the three most dominant federal environmental statutes have provisions which require federal agencies to comply with state environmental laws and regulations as any other person does. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, §1323 (1988); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i, *as amended by* The Federal Facilities Compliance Act, Pub. L. 102-386, 42 U.S.C. §6961 (West Supp. 1993); Clean Air Act, 42 U.S.C. §§ 7401-7671q, § 7418 (1988 & West Supp. 1994). Federal land-use statutes do not waive sovereign immunity, but require federal agencies to consider state laws, regulations, and policies in their land management decisions. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988), as implemented by Council on Environmental Quality Regulations, 40 C.F.R. §§ 1501-1508 (1993); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464, § 1456 (1988 & West Supp. 1994); Endangered Species Act, 16 U.S.C. §§ 1531-1544, § 1536 (1988 & West Supp. 1994).

318. These statutes generally have very broad language that express no evidence of congressional intent to preempt state law to allow for unimpeded military training. For example, "[T]he

Secretary of the Navy may acquire real property for the installations and locations inside the United States...." 1992 National Defense Authorization Act, § 2201, Pub. L. 102-484, 106 Stat. 2315 (1992). Even when Congress authorizes military agencies to acquire specific parcels of property, it says nothing to indicate preemption. See *id.* §§ 2831-2848. Congress has gone the other way and required defense agencies to comply with otherwise inapplicable state environmental laws. See, e.g., 1987 National Defense Authorization Act, § 2207 Pub. L. 99-661, 100 Stat. 3816 (1986) (Funds for construction of naval home port facility in Everett, Washington, conditioned upon obtaining state environmental permits). This law is the subject of *Friends of the Earth v. Navy*, 841 F.2d 927 (9th Cir. 1988).

319. See, e.g., *Pollard's Lessee v. Hagan*, 4 (3 How.) 212 (1845).

320. *English v. General Electric Company*, 496 U.S. 72, 79 (1990).

321. *Id.*, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

322. See *United States v. Curtis-Wright*, 299 U.S. 304 (1936); *United States v. Cal.*, 332 U.S. 19 (1947).

323. *English v. General Electric Company*, 496 U.S. 72, 79 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

324. 461 U.S. 190 (1983).

325. *Id.* at 194.

326. *Id.* at 213.

327. Courts have long been reluctant to delve into questions of military training requirements. *See. e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981).

328. 397 U.S. 137 (1970).

329. In *H.P Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-535 (1949) the Supreme Court articulated the purpose of the negative Commerce Clause theory as follows.

The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more that by interpretation of its written word, this Court has advanced the solidarity of this Nation by the meaning it has given to these great silences of the Constitution.

(Quoted with approval in *Hughes v. Oklahoma*, 441 U.S. 322, 326, note 2 (1979)).

330. *Pike v. Brice Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted).

331. Congress could create state veto power over certain military projects and thus remove from the judiciary the question of whether the state's law interferes with the federal government's war powers. This has occurred in both a Commerce Clause context (*See Ill. Cent. R.R. v. Ill.*, 146 U.S. 387, 439-440 (1892) where Congress required Illinois to obtain Chicago's consent to a railroad before the state could acquire federal monies) and a national security context (*Romero-Barcelo v. Brown*, 643 F.2d 843-846, *rev'd on other grounds sub nom.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)) where Congress required the Navy to conclude an agreement with Puerto Rico before relocating training facilities). Without a congressional waiver, however, states must bear in mind the limits of their authority. "The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred." *Sporhase v. Nebraska*, 458 U.S. 941, 959-60 (1981) This must be true with respect to the negative aspects of the Congress' war powers authority as well.

332. *Hancock v. Train*, 426 U.S. 167, 180 (1976).

333. See PUBLIC TRUST DOCTRINE, *supra* note 15, at chapter X.

334. See *supra* note 223 and accompanying text.

335. In the sections that follow, I present ways in which states

may apply their public trust laws to military activities. The list is not exhaustive. My analysis is purposely shallow. My goal is simply to alert military attorneys to the possible challenges public trust laws may pose to their services' missions.

In an effort to add some specificity to a paper that is long on generalities, I use North Carolina and California laws as examples throughout this section. Those states are homes to the Marine Corps' largest installations.

336. Cal. Coastal Comm'n v. Granite Rock, 480 U.S. 572, 580 (1987); Friends of the Earth v. Navy, 841 F.2d 927 (9th Cir. 1988).

337. N.C. ADMIN CODE T15A: 07H. 0102(e) (Apr. 1990).

338. N.C. Admin. Code, T15A: 07K .0402 (1993).

339. N.C. CONST. art. XIV, § 5 (1993).

340. CAL. CONST. art. 10, § 3.

341. CAL. CONST. art. 10, § 3.

342. *Id.* § 4.

343. CAL. PUB. RES. CODE, § 30007.5 (199\_).

344. N.C. GEN. STAT. §§ 113A-134.1 through 134.10; CAL. PUB. RES. CODE §§ 30210-30214, 30530-30534, and 31400-31405 (19\_\_).

345. N.C. ADMIN. CODE § T15A: 07H .0207 (Jan. 1993).

346. 16 U.S.C. § 1452(2)(D) (1988 & West Supp. 1994).

347. CALIF. PUB. RES. CODE § 30008 (1986 & 1994 Supp.).
348. CAL. PUB. RES. CODE § 30212 (1986 & 1994 Supp.).
349. CAL. PUB. RES. CODE § 30220 (1986 & 1994 Supp.).
350. CAL. PUB. RES. CODE § 30230 (1986 & 1994 Supp.).
351. CAL. PUB. RES. CODE § 30231 (1986 & 1994 Supp.).
352. CAL. PUB. RES. CODE § 30234.5 (1986 & 1994 Supp.).
353. CAL. PUB. RES. CODE § 30222.5 (1986 & 1994 Supp.).
354. N.C. ADMIN. CODE T15A: 07M .0200 through .1000 (Feb. 1990).
355. N.C. ADMIN. CODE T15A: 07M .0100 (Feb. 1990).
356. 33 U.S.C. § 3 (1988). See the regulations for Navy and Marine Corps training areas, 33 C.F.R. §§ 334.410-440 (1993).
357. 16 U.S.C. section 670a-1 (West Supp. 1993). Multiple land use and public access requirements became a part of the Sikes Act, 16 U.S.C. sects. 670 *et seq.*, in a 1986 amendment. The amendment's sponsor justified its enactment with these words:

No one disputes that the military mission must be of paramount importance [] [on] these reservations, however, the lands are held as a public trust and should be managed on a multiple use basis when compatible with military purposes. Public access appropriate and necessary for those multiple uses is also provided [in the amendment], to the extent that

such access is consistent with the military mission of the reservation.

Remarks of Mr. Chafee, 99 CONG. REC. 28617, Oct. 3. 1986.

358. Barcelo v. Brown, 478 F. Supp. 646, 682-87 (D. P.R. 1979) *aff'd in part, vacated in part on other grounds*, 643 F.2d 35 (1st Cir. 1981), *rev'd on other grounds sub nom.*, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

359. *Supra* note 352.

360. 42 U.S.C. §§ 9601-9675, §9620 (1988 & West Supp. 1993). CERCLA applies to the Department of Defense through the Defense Environmental Restoration Program, 10 U.S.C. §2701-2708 (1988 & West Supp. 1993).

361. 40 C.F.R. § 300.430(d)(3) (1993).

362. 40 C.F.R. § 300.515(d) (1993).

363. Applicable or relevant and appropriate requirements flow from 42 U.S.C. § 9621. The Environmental Protection Agency defines ARARS in the following way: "*Applicable requirements* mean those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site."



*Relevant and appropriate requirements* mean those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not "applicable" to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to a particular site.

40 C.F.R. sect. 300.5 (1993).

State public trust law would specifically address a location if the release occurred within the trust corpus; it would be an "applicable requirement." If the release occurred near, but outside the trust corpus, public trust law might still be a "relevant and appropriate requirement."

364. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.175(b)(4) (1993).

365. 40 C.F.R. §§ 300.135(j) and 300.430(b)(7) (1993). See 40 C.F.R. subpart G for a discussion of natural resources trustees.

366. 40 C.F.R. § 300.605 (1993). One could argue the United States is trustee for those parts of the marginal sea it controls during military training. See 40 C.F.R. sect. 300.600(a)(2) (1993). But in the without affirmative congressional action, the

Submerged Lands Act would seem to place the resources under state control. See *supra* part III.B.2.

367. 40 C.F.R. § 300.615(e) (1993).

368. 40 C.F.R. § 300.430(a)(1)(iii)(D) (1993).

369. At an EPA-controlled CERCLA site, the EPA can disregard the state's recommendations when it selects the final remedy. 40 C.F.R. § 300.515(d)(3). If a state feels strongly enough about its position, it can challenge the federal decision in court. 42 U.S.C. § 9659 (West Supp. 1993).

370. 40 C.F.R. § 300.615(c)(4) (1993).

371. 42 U.S.C. §§ 6901-6961q (1988 & West Supp. 1993).

372. 42 U.S.C. § 6926 (1988 & West Supp. 1993).

373. Pub.L 102-386, 106 Stat. 1505 (1992).

374. FFCA, § 102(a), 42 U.S.C. § 6961(a) (West Supp. 1993).

375. 42 U.S.C. §§ 6972(a) and 6973(a) (1988 & West Supp. 1993), respectively.

376. Hazardous waste is elaborately defined in 40 C.F.R. § 261.3 (1992). Figures 1 through 3 following 40 C.F.R. Part 260 provide a good overview of the definitional process.

377. FFCA § 107, 42 U.S.C. § 6924(y) (West Supp 1993).

378. Connecticut Coastal Fishermen's Ass'n. v. Remington Arms Co, Inc., 989 F.2d 1305 (2d Cir. 1993). The court declined to rule on whether munitions are hazardous wastes from the RCRA

regulatory standpoint; that definition is different. Thus, under Remington Arms, neither the state nor the EPA can authoritatively claim they have the power to regulate military munitions or training ranges under a RCRA permit. From a judicial standpoint, the issue remains open.

379. 42 U.S.C. § 6973 (1988).

380. 42 U.S.C. § 6929 (1988).

381. Once the EPA promulgates its munitions regulations, any state law to the contrary might be preempted. Whether the state could justify its contrary position based upon a unique need to protect its trust corpus would present an interesting issue. Of course EPA may ultimately promulgate regulations that declare munitions to be hazardous waste once they leave the weapons system.

382. The money and manpower necessary to track and recover munitions from the bed of the marginal sea is nearly incalculable. Live-fire training exercises would likely be curtailed or eliminated as a result. And without those exercises, military training becomes unrealistic -- preparedness declines. Naval forces simply cannot train for amphibious operations without understanding the friction generated during live-fire operations. *See generally* U.S. MARINE CORPS, FMFM 1, WARFIGHTING (Mar. 6, 1989). The gulf between training and combat becomes too wide to bridge when the time comes to commit American forces to action.

383. California specifically states that its coastal management program does not limit the state's ability to abate a nuisance. CAL. PUB. RES. CODE § 30005 (1986 & 1994 Supp.).

384. 28 U.S.C. §§ 1291, 1346(b), 1346(c), 1402(b), 2401(b), 2411, 2412(c), 2671-2680 (1988).

385. *Barcelo v. Brown*, 478 F. Supp. 646, 662 (D. P.R. 1979) *aff'd in part, vacated in part on other grounds*, 643 F.2d 35 (1st Cir. 1981), *rev'd on other grounds sub nom.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

386. A different result might occur if a federal public trust doctrine existed, because national security would be a protected public interest. Whether a state or individual citizen could challenge military training under the federal common law of nuisance is another matter. A federal court might be reluctant to create a federal nuisance remedy because of the existence of other federal laws that govern coastal waters; e.g., the Coastal Zone Management Act and the Submerged Lands Act. For an analysis of federal common law and public nuisance, see both *Illinois v. Milwaukee*, 406 U.S. 91 (1972), and *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

387. Another preemption argument would arise concerning the RCRA. Statutory environmental schemes can preempt public nuisance laws. *Milwaukee v. Illinois*, 451 U.S. 304 (1981). Here, the question would be whether the RCRA and the FFCA preclude states from regulating munitions as anything other than

hazardous wastes. *See also* Nat'l Audubon Soc'y v. Dep't of Water, 869 F.2d 1196 (9th Cir. 1988).

388. 33 U.S.C. §§ 401-467n (1988).

389. 33 U.S.C. § 1344 (1988).

390. 33 C.F.R. § 320.2(b) (1993).

391. 33 U.S.C. § 320.2(f) (1993).

392. 33 C.F.R. §§ 322.3(c), 323.3(b) (1993).

393. 33 C.F.R. § 320.4(a) (1993).

394. 33 C.F.R. § 320.4(a)(1) (1993).

395. 33 C.F.R. § 320.4 (1993).

396. 33 C.F.R. § 320.4(j)(1) (1993).

397. 33 C.F.R. § 320.4(j)(2) (1993).

398. *Id.*

399. 33 C.F.R. § 320.4(a)(3) (1993).

400. 33 C.F.R. § 320.4(h) (1993).

401. Section 307 of the Federal Aviation Act of 1958, gives the Federal Aviation Administration (FAA) authority to designate special-use airspace. 49 App. U.S.C. § 1348 (West 1990).

402. 14 C.F.R. § 73.3 (1993).

403. 14 C.F.R. §§ 11.61 through 11.75 (1993).

404. *Id.*, and 14 C.F.R. § 73.19 (1993).

405. 14 C.F.R. § 11.65 (1993).
406. 14 C.F.R. § 11.67 (1993).
407. *Id.*
408. 49 App. U.S.C. § 1347 (West 1990).
409. In re Braniff Airways, Inc., 700 F.2d 935, (5th Cir. 1983), *reh'g denied* 705 F.2d 450.
410. 49 App. U.S.C. § 1348(a) (West 1993).
411. N.C. ADMIN. CODE T15A: 07M .0902 (1992). State airspace regulations are not necessarily preempted by FAA rules. See, County of Westchester v. County of Greenwich, Conn., 793 F.Supp. 1195 (S.D.N.Y. 1992), Wood v. City of Huntsville, Ala., 384 So.2d 1081 (Ala. 1980), and Aircraft Owners and Pilots Ass'n v. port Authority of New York, 305 F.Supp. 93 (D.N.Y. 1969).
412. Consider the references to public trust values in the legislative history of the Coastal Zone Management Act. 136 CONG. REC. H8071-72 (1990); H. REP. NO. 1012, *supra* note 268, at 16, 19, 32 *reprinted in* 1980 U.S.C.A.A.N. 4364, 4367, 4380.
413. NEPA is codified at 42 U.S.C. sect. 4321-4370a (1988). "Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14 (1993).
414. 40 C.F.R. § 1501.4 and Part 1502 (1993).
415. 40 C.F.R. §§ 1501.3 and 1508.9 (1993).

416. 40 C.F.R. §§ 1507.3(b)(2)(ii) and 1508.4 (1993).

417. 40 C.F.R. § 1500.1 (1993).

418. 40 C.F.R. § 1500.1(c) (1993).

419. *Found. on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991).

420. *Rankin v. Coleman*, 394 F.Supp. 647 (D.N.C. 1975) *mod. on other grounds* 401 F.Supp. 664. State officials are sure to point this out when they review the draft environmental impact statement or the finding of no significant impact.

421. 40 C.F.R. § 1502.14 (1993).

422. 32 C.F.R. § 775.6(e)(5) (1993). The Department of Defense NEPA regulations prohibit use of a categorical exclusion if the proposed action involves "endangered species, archeological remains, or other cultural, historic, or protected resources." 32 C.F.R. § 188, encl. 1, ¶ B.6.d(3) (1993).

423. Courts will not automatically issue an injunction.

*Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152 (9th Cir. 1988). State agencies have standing to sue. *Sabine River Authority v. U.S. Dept. of Interior*, 745 F.Supp. 388 (E.D. Tex. 1990), *aff'd* 951 F.2d 669.

424. 16 U.S.C. §§ 670a and 670c-1 (West Supp. 1993). Congress appropriated funds to encourage development of these agreements. 16 U.S.C. § 670f (West Supp. 1993).

425. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983). Discussed in part II.D.1 *supra*.

426. PUBLIC TRUST DOCTRINE, *supra* note 15, at 242.

427. The seminal case in this area is United States v. Causby, 328 U.S. 256 (1946). See also Branning v. United States, 654 F.2d 88 (Ct. Cl. 1981).

428. Branning, 654 F.2d 88. See also Army regulation on unintentional condemnation, 32 C.F.R. § 644.103(a) (1993).

429. 32 C.F.R. § 644.102 (1993).

430. The Submerged Lands Act increases the likelihood of a successful taking claim. "It denies the right of the National Government to take and use any elements in the bed of the ocean necessary for national defense, without paying therefore in accordance with the law of eminent domain." H. REP. NO. 1778, 80th Cong., 2d Sess., (1950), reprinted in 1953 U.S.C.A.A.N.

1463. State lands are "property" within the meaning of the Fifth Amendment. United States v. 50 Acres of Land, 469 U.S. 24 (1984).

431. 43 U.S.C. § 1311(a) and 1314(a) (1988).

432. 43 U.S.C. § 1314(a).

433. 43 U.S.C. § 1314(b) (1988).

434. See *supra* part II.B.4. A court could split hairs still further and find the states have superior interest in the lands



that justifies compensation for partial takings. While that type of finding might be the most expedient way to resolve the issue, it would do little to clarify the parameters of the federal government's paramount powers in the marginal sea.

435. See *supra* part II.D.

436. See *supra* part II.E.

437. 5 U.S.C. §§ 701-706 (1988).

438. Citizens might do this by introducing evidence that military exercises damage public trust resources to such a degree as to render them useless for their intended purposes. This argument would be difficult to sustain because it requires the plaintiffs to demonstrate prospective harm. Analogizing to other military training areas would prove difficult in light of judicial determinations that military activities may actually preserve the environment. See *Barcelo v. Brown*, 478 F. Supp. 646 (D. P.R. 1979) *aff'd in part, vacated in part on other grounds*, 643 F.2d 35 (1st Cir. 1981), *rev'd on other grounds sub nom.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

439. See *supra* part II.D.1. Of course, a court could adopt the "deliberate and reasonable" standard of *West Indian Company v. Gov't of the Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988). We must be careful to distinguish alienation by a legislature, however, from alienation by a state administrative agency. Courts are less likely to view the latter as

representatives of the sovereign people. *See supra* note 146 and accompanying text.

440. *Lake Mich. Fed'n v. U.S. Army Corps of Engineers*, 742 F. Supp. 441 (N.D. Ill. 1990). Underlying the Lake Michigan Federation court's decision to disregard federal and state agency determinations was its decision to disregard the ultimate voice of the people, Illinois' Legislature. This harkens back to Illinois Central itself.

441. *See supra* part II.A.

442. *See supra* note 146.

443. *See supra* part III.A.

444. *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

445. *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

446. *Murphy v. Dep't of Natural Resources*, 837 F. Supp. 1217 (W.D. Fla. 1993); *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991).

447. *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572, 580 (1987); *Friends of the Earth v. Navy*, 841 F.2d 927 (9th Cir. 1988).

448. 61 Stat. 419 (1948).

449. 42 U.S.C. §§ 11001-11050 (1988 & West 1993).

450. Exec. Order No. 12856, 58 Fed. Reg. 41981 (1993).

451. Exec. Order 12612, 52 Fed.Reg. 41685 (1988).
452. *Id.* § 2(i).
453. *Id.* § 6.
454. 332 U.S. 19 (1947).
455. 464 U.S. 312 (1984).
456. See, *Ohio v. Dep't of Energy*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1627, 118 L. Ed. 2d 255 (1992); *Hancock v. Train*, 426 U.S. 167 (1976). These cases precipitated amendments to the Clean Air Act in 1977, Pub. L. 95-95, 91 Stat. 685 and the Resource Conservation and Recovery Act in 1992 (Federal Facilities Compliance Act, Pub.L. 102-386, 106 Stat. 1505 (1992)).
457. Unlike the states and private interests, the military lacks a formal congressional lobby. S. REP. NO. 133, 83d Cong., 1st Sess., (1953), *reprinted in* 1953 U.S.C.A.A.N. 1643.
458. *Ala. v. Tex.*, 374 U.S. 272, 273-74 (1954) (per curium); *United States v. Cal.*, 332 U.S. 19, 39-40 (1947); *United States v. San Francisco*, 310 U.S. 16, 29 (1939); *Light v. United States*, 220 U.S. 523 (1911); *Shively v. Bowlby*, 152 U.S. 1, 30 (1893); *United States v. Trinidad Coal Co.*, 137 U.S. 160, 170 (1890) ("All the public lands of the nation are held in trust for the people of the whole country.").
459. Nonetheless, some commentators say there is a federal public trust doctrine. Selvin, *supra* note 14, at 10, wrote,

the years between 1870 and 1920 also saw the evolution of a substantial body of important federal public trust rights governing the disposition and development of navigable waterways, mineral resources and the remaining public domain. The articulation of these federal public trust rights by the federal courts resulted, in some instances, in the appropriation of trust powers by the federal government that had traditionally resided in the states as sovereign powers. This development, which was consistent with the general political trend toward centralization of federal power during those years, constituted an important legal precedent for the assertion, during the mid-twentieth century, of even broader federal trust powers over the reservation or disposition of wilderness areas and offshore oil reserves.

While Selvin's dissertation is an invaluable resource regarding the historical perspective of public trust law and policy, her identification of public trust decisions is too broad. The authors of PUBLIC TRUST DOCTRINE, *supra* note 15, were more careful. While they begin their chapter on federal-state relations with the assertion that "the federal government [has] public trust responsibilities itself over trust lands, waters, and resources," (*Id.* at 299), they later say

At the very least, [state] coastal managers should take

the position that, despite the relative paucity of law on the subject, both State and federal governments are presumptively bound to honor the public trust in any shorelands they control, in absence of any clear evidence of congressional intent to the contrary.

*Id.* at 313.

460. District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1078 (D.C. Cir. 1984).

461. Conservation Law Foundation v. Watt, 560 F.Supp. 561 (D. Mass. 1983) (Court found the Secretary of the Interior violated the Coastal Zone Management Act and National Environmental Policy Act. On a motion for summary judgment the court found the Foundation's public trust claims were "adequately addressed by the balance of the plaintiffs' complaint," and refused to address them. 560 F.Supp. 561, 580 (D. Mass. 1983). The case was affirmed *sub nom.*, Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983), but the Foundation did not assert its public trust claim on appeal). *Sierra Club v. Andrus*, 487 F.Supp. 443 (D. D.C. 1980) (Court found Secretary of the Interior had no independent public trust duty to protect public lands; his duty was purely statutory as stated by congressional committee in the legislative history of the National Park Service Organic Act, 16 U.S.C. section 1. This case was affirmed *sub nom.*, *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) where once again the plaintiff only appealed the statutory issue).

462. 495 F. Supp. 38 (E.D. Va. 1980).

463. 523 F. Supp. 120 (D. Mass. 1981).

464. 332 U.S. 19 (1947).

465. Ill. Cent. R.R., 146 U.S. at 453.

466. The quote is its entirety reads,

The Government, which holds its interests here as  
*elsewhere* in trust for all the people, is not to be  
deprived of those interests by the ordinary court rules  
designed particularly for private disputes over  
individually owned pieces of property; and officers who  
have no authority at all to dispose of Government  
property cannot by their conduct cause the Government  
to lose its valuable rights by their acquiescence,  
laches, or failure to act.

332 U.S. at 40 (emphasis added).

467. United States v. Summerlin, 310 U.S. 414 (1940); Guaranty  
Trust Co. of N.Y. v. United States, 304 U.S. 126 (1938); United  
States v. New Orleans Pac. Ry., 248 U.S. 507 (1919).

468. See note 458, *supra*.

469. United States v. San Francisco, 310 U.S. 16, 29 (1939)  
("Thus, Congress may constitutionally limit the disposition of  
the public domain to a manner consistent with its views of public  
policy."); Ashwander v. TVA, 297 U.S. 288, 336 (1936) ("The United  
States owns the coal, or the silver, or the lead, or the oil, it

obtains from its lands, and it lies in the discretion of Congress, acting in the public interest, to determine how much of the public property it shall dispose."); *Light v. United States*, 220 U.S. 523, 537 (1911) ("[I]t is not for courts to say how that trust shall be administered. That is for Congress to determine."); *Shively v. Bowlby*, 152 U.S. 1 (1893) (Federal government can sell submerged lands to private parties while holding lands in trust for future states).

470. Congress could chose to push the extent of its modern Commerce Clause power to prevent depletion of coastal resources by states. This would act to impliedly repeal the Submerged Lands Act, however, because such a heavy-handed move is inconsistent with the states' "right and power to manage, administer, lease, develop, and use [submerged] lands and natural resources." 43 U.S.C. § 1311(a) (1988).

471. See *Ala. v. Tex.*, 374 U.S. 272 (1954) (per curium) (Black, J., dissenting) and (Douglas, J., dissenting); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972).

472. Justice Black took issue with the *Alabama v. Texas* per curium decision, but, as stated in the text, we cannot construct a federal public trust doctrine based upon the *United States v. California* decision alone.

473. Seven years after the 1.58 Acres decision, a federal court on the opposite side of the country declined to follow 1.58 Acres on virtually the same facts. *United States v. 11.037 Acres of*

Land, 685 F.Supp. 214 (N.D. Cal. 1988). Unfortunately, the court misread 1.58 Acres as subjecting the federal government to state public trust law and used that as its basis to disregard the opinion.

474. S. REP. NO. 133, 83d Cong., 1st Sess., (1953), *reprinted in* 1953 U.S.C.A.A.N. 1479-80, 1589; S. REP. NO. 1592, 80th Cong., 2d Sess., (1950), *reprinted in* 1953 U.S.C.A.A.N. 1525; H. REP. NO. 1778, 80th Cong., 2d Sess., (1950), *reprinted in* 1953 U.S.C.A.A.N. 1435-37.

475. 42 U.S.C. §§ 4321, 4331 (1988).

476. 43 U.S.C. §§ 1701-1784, §§ 1701(a)(5), (7), (8), (11), (12), 1781(a), (b) (1988).

477. 16 U.S.C. §§ 1, 1a-1 (1988).

478. 33 U.S.C. §§ 1251-1387, § 1251(a) (1988).

479. 16 U.S.C. §§ 1431-1445, §§ 1431, 1433 (1988).

480. 33 U.S.C. §§ 401-467n, §§ 426e, 426l (1988).

481. Proclamation No. 5030, 48 Fed.R. 10601 (1983).

482. *See supra* part III.B.4.

483. *See Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970) (for purposes of determining scope of navigable servitude, "destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas, devastating, effect on interstate commerce); *State of Alaska v. United States*, 662 F.



Supp. 455 (D. Alaska 1987) *aff'd* 891 F.2d 1401 (9th Cir. 1989) (court can consider shallow draft recreational boats -- not just deep draft commercial vessels -- when determining whether a river is navigable in fact).

484. Historically, the Supreme Court has treated navigable waters inland of the coastline as belonging to the states. *Pollard's Lessee v. Hagan*, 4 (3 How.) 212 (1845). *See also* *United States v. Cal.*, 332 U.S. 19, 36 (1947). The Submerged Lands Act just codified that treatment. It is clear that the United States can exercise its navigational servitude there, *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82 (1913), but Justice Black's paramount powers doctrine applies only seaward of the coast. Arguably, the Submerged Lands Act extended the federal government's paramount powers inland because it makes no distinction in section 6(a) between the federal government's rights in inland versus seaward waters. I chose to limit my argument for the creation of a federal public trust doctrine to the area where both the navigational servitude and paramount powers definitely apply.

485. Here I refer to paramount powers as espoused by Justice Black in *United States v. California*, 332 U.S. 19, not as used in section 6(a) of the Submerged Lands Act, 43 U.S.C. section 1314(a).

486. Nevertheless, it is difficult to reconcile non-ownership

with the constitutionality of the Submerged Lands Act. *See supra* notes 226-233 and accompanying text.

487. *Friends of the Earth v. Navy*, 841 F.2d 927, 932 (9th Cir. 1988).

488. This is well brought out in *Humane Society v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988). Hodel analyzes the U.S. Supreme Court's treatment of standing in environmental actions in *Sierra Club v. Morton*, 405 U.S. 727, (1971), and *United States v. S.C.R.A.P.*, 412 U.S. 669 (1972).

489. One could argue this would overwhelm already overburdened federal courts. I disagree. There is no money that flows from public trust litigation. The remedy is to correct mismanagement or to halt a particular project. For this reason, I believe enforcement of a federal public trust doctrine would fall to those public interest groups that currently contest federal agency decisions under land-use and environmental laws.

Moreover, since most federal public trust litigation would be tied to federal statutory claims that would exist regardless of federal public trust claims, the number of lawsuits would increase only in those rare instances when the public trust doctrine provided the exclusive means to challenge federal agency action.

490. Another way to view this is the states retain their *jus publicum* interests in the lands, but the federal government has a superior *jus publicum* right. This creates a two-tiered *jus*

*publicum* approach to public trust law which might seem cumbersome. Yet state public trust law has always recognized the federal government's superior right to lands under navigable waters in the form of the navigational servitude. Creation of a federal public trust doctrine does not alter this relationship, it simply expands the federal government's interests beyond those of merely navigation.

491. 43 U.S.C. § 1314(b) (1988).

492. Arguably, section 1311(a)(1) of the Submerged Lands Act, 43 U.S.C. § 1311(a)(1) gives the states more than a *jus privatum* interest in the lands and resources under the marginal sea. That may be true in the abstract. But the only way to reconcile the act with the Supreme Court's opinions is to conclude that the federal government has retained an interest in the lands. It cannot be otherwise. If it were, Congress would have abdicated its constitutional authority in passing section 1311(a)(1) of the Act. To say that the retained federal interest is less than a *jus publicum* interest and the states' interests more than *jus privatum* interests, is to split hairs unnecessarily.

493. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1988).

494. The seaward extent of the United States trust corpus involves issues of international law and is thus beyond the scope of this paper. Arguably, it extends at least as far as the Exclusive Economic Zone. Presidential Proclamation 5030, ??????.

495. See *United States v. 50' Right of Way or Servitude in, on, over, and Across Certain Lands Situated in Bayonne, Hudson County, N.J.*, 337 F.2d 956 (3d Cir. 1964); *United States v. 412.715 Acres of Land, Contra Costa County, Cal.*, 53 F. Supp. 143 (N.D. Cal. 1943).

496. Some members of the 80th Congress considered national defense within the scope of the navigational servitude. H. REP. NO. 1778, 80th Cong., 2d Sess., (1950), *reprinted in* 1953 U.S.C.A.A.N. 1450-56.

497. Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1)(B) (West Supp. 1993); Endangered Species Act, 16 U.S.C. § 1536(j) (1988); Federal Water Pollution Control Act, 33 U.S.C. § 1323(a) (1988); Resource Conservation and Recovery Act, 42 U.S.C. 6961(a) (West Supp. 1993); Clean Air Act, 42 U.S.C. § 7418(b) (West Supp. 1993).

498. 16 U.S.C. § 1452(2)(D) (West Supp. 1993).

499. 43 U.S.C. § 1314(a) (1988).

500. This is not true of states that have not yet incorporated their public trust law into their Coastal Management Programs. See *supra* part III.B.3.

501. See *supra* part III.2.A.2(d).

502. 15 C.F.R. § 930.32(a) (1993).

503. The "coastal zone" does not include lands "subject solely to the discretion of or which is held in trust by the Federal

Government, its officers, or agents." 16 U.S.C. § 1453(1) (West Supp. 1993). Under a federal public trust doctrine, a federal agency could exercise the *jus publicum* and take a portion of land for its needs. That action would "affect" the coastal zone and thus be the subject of a consistency determination. *Id.*

§ 1456(c). Later actions -- those confined to the taken area, but not contemplated in the initial taking -- may not require a consistency determination. The agency could argue its subsequent actions do not affect the coastal zone.

504. Consider, e.g., North Carolina's policy on water-based military targets, N.C. ADMIN CODE T15A: 07M .1001 (Feb. 1990).

505. 16 U.S.C. § 1451(a) (West Supp. 1993).

APPENDIX 1

**An Act**

To authorize the Secretary of Defense to establish certain areas in the coastal waters of the United States for the sole purpose of National Defense.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE

This Act may be cited as the "Coastal Training Area Act of 19XX."

SECTION 2. FINDINGS AND DECLARATIONS

Congress hereby finds and declares the following:

- a. World crises and other situations to which the United States finds it necessary to respond with armed force have historically occurred, and are likely to continue to occur, in the littoral areas of the world.
- b. In order to effectively train United States military forces to respond to actions in littoral areas of the

world, it is essential to utilize certain littoral areas of the United States as military training areas.

c. That military training areas in the littoral waters of the United States will not be effective unless the Department of Defense has exclusive control over such areas.

d. That military training is in the public interest and consistent with the public trust.

### SECTION 3. Definitions.

a. *Coastal area of the United States* means any area within the sovereign control of the United States comprising lands, sea, and air seaward of the high water mark or seaward of the line of inland waters of the Several States and extending seaward for three miles. Such lands and waters lie within the federal public trust.

b. *Exclusive Defense Areas* mean areas within the coastal area of the United States established by the Secretary of Defense, in accordance with the procedures in section 3 of this Act, for training the military forces of the United States, and in which no

unauthorized persons may enter except as permitted by the Secretary of Defense.

c. *Person or persons* as used in this Act shall mean natural persons, corporations, state and local governments, and non-Department of Defense agencies of the federal government.

#### SECTION 4. EXCLUSIVE DEFENSE AREAS

a. When necessary in the interest of National Defense, Secretary of Defense, with the approval of the President, may declare certain coastal areas of the United States "Exclusive Defense Areas."

b. Action by the Secretary of Defense pursuant to this Act constitutes an exercise of the paramount authority of the United States, and is thus consistent with those powers reserved to the United States in section 1314(a) of the Submerged Lands Act, 43 U.S.C. § 1314(a).

c. Action by the Secretary of Defense pursuant to this Act shall be deemed consistent with applicable state's or states' coastal management programs to the maximum extent practicable under the Coastal Zone Management Act, 16 U.S.C. § 1456. The Secretary's decision shall not be challengeable in the courts of the United States



or subject to the mediation provisions of the Coastal Zone Management Act, 16 U.S.C. § 1456(h).

d. Department of Defense activities conducted within Exclusive Defense Areas shall be governed at all times by applicable federal environmental laws and regulations, including defense agency regulations, and shall also be conducted in such a manner as to preserve the public trust for use by future generations of Americans.